United States Court of Appeals

for the Second Circuit

APPENDIX

75-7647

In The

United States Court of Appeals

For The Second Circuit

CONSTANTINE MONTAGNA,

Plaintiff-Appellant,

- against -

JOHN T. O'HAGAN, as FIRE COMMISSIONER OF THE CITY OF NEW YORK and as CHAIRMAN and TREASURER OF THE FIRE DEPARTMENT PENSION FUND (ARTICLE I) and the TRUSTEES of the FIRE DEPARTMENT PENSION FUND,

Defendants-Appellees.

JOINT APPENDIX

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PROCEEDINGS

DATE		
4-22-75	Complaint filed - Summons issued.	(1)
5- 2-75	Summons returned and filed executed.	(2)
5-13-75	Answer filed.	(3)
5-28-75	By PLATT, J. Stipulation dtd 5-28-75 adjourning the action to 6-20-75 filed.	(4)
6-20-75	Before PLATT, J.,- Case called. Adj'd to 7-18-75.	
8-18-75	Motion for summary judgment ret 8-29-75 filed.	(5)
8-18-75	Pltff's memorandum of Law in support of motion for summary judgment filed.	(6)
8-18-75	Statement pursuant to Rule 9(g) filed.	(7)
8-18-75	Affidavit of Howard C. Fischbach filed.	(8)
8-20-75	Notice of Motion and memorandum of law for summary judgment in favor of defendants, returnable 8-29-75 at 11:30 A.M. filed.	(9/10)
8-25-75	Reply memorandum of law filed.	(11)
8-28-75	Defts' memorandum of law in opposition to pltff's cross-motion for summary judgment filed.	(12)
8-29-75	Before PLATT, J. - Case called. Motion for summary judgment argued. Decision reserved. (Pltff & Defts)	
10-23-75	By PLATT, J. - MEMORANDUM & ORDER dtd 10-22-75 dismissing pltff's complaint filed. (gm)	(13)
10-24-75	JUDGMENT dtd 10-24-75 dismissing complaint filed. (p/c mailed to attys)	(14)
11-19-75	Notice of appeal filed. Copy mailed to Cor A.	(15)

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT (Filed August 18, 1975)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

CONSTANTINE MONTAGNA,

Plaintiff,

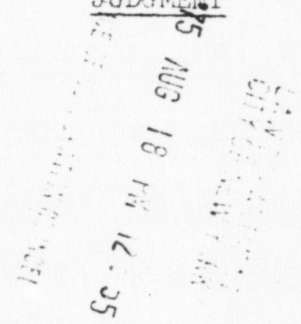
-against-

JOHN T. O'HAGAN, as FIRE COMMISSIONER OF THE CITY OF NEW YORK and as CHAIRMAN and TREASURER OF THE FIRE DEPARTMENT PENSION FUND (ARTICLE I) and the TRUSTEES of the FIRE DEPARTMENT PENSION FUND,

Defendants.
----------x

75 C. 602

MOTION FOR SUMMARY JUDGMENT



S I R :

PLEASE TAKE NOTICE that upon the annexed affidavits of CONSTANTINE MONTAGNA and HOWARD C. FISCHBACH, both duly verified on the 15 day of August, 1975, upon the annexed copy of the marked complaint, sworn to the 21st day of April 1975 with plaintiff's Exhibits "1" and "2" attached thereto, on the copy of defendants' answer, verified the 12th day of May, 1975, upon the verified complaint in Sarrosick et al. v. Lowery et al., and the Notice of Appearance and Answer of the defendants in that action, verified December 15, 1970 (paragraph "THIRD" of said Answer by order of the Court was formally not amended but deemed amended to include a denial of paragraph "TWELFTH" of the complaint in Sarrosick v. Lowery, both of which instruments are attached hereto as one exhibit and marked Plaintiff's Exhibit "3", upon the document entitled "Administrative Separation of Limited Service Personnel From the Fire Department" herein marked as Plaintiff's Exhibit "4" and upon a separate single document containing in its full content and context, the

minutes of the testimony on direct and cross-examination of the witness, BERNHARD J. MILLER, from pp. A55 to A127, the witness CONSTANTINE MONTAGNA from pp. 127 to A160 and the witness, ANDREW T. DOHERTY, from pp. 179 to A205 given at the New York State Supreme Court trial in Sarrosick et al. v. Lowery et al., and herein marked as Plaintiff's Exhibit "5" (accompanying but not attached to the motion papers), and upon all the proceedings heretofore had herein, the plaintiff will move this Court at a Stated Term for the hearing of motions to be held at the United States District Court House for the Eastern District of New York in Court-room 7 on the 29th day of August, 1975, at 11:30 A.M., or as soon thereafter as counsel can be heard for an Order pursuant to Rule 56 of the Federal Rules of Civil Procedure granting a summary judgment in favor of the plaintiff and against the defendants upon the ground that there is no genuine issue of any material fact and that plaintiff is entitled to a judgment as a matter of law.

Dated, New York, New York
August 15, 1975

Yours, etc.,

HOWARD C. FISCHBACH
Attorney for Plaintiff
Office & P.O. Address
78-15 221 Street
Flushing, N.Y. 11364
(212) 465-4096

TO: W. BERNARD RICHLAND, Esq.
Corporation Counsel
Attorney for Defendants

AFFIDAVIT OF CONSTANTINE MONTAGNA IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

CONSTANTINE MONTAGNA,

Plaintiff,

-against-

JOHN T. O'HAGAN, as FIRE COMMISSIONER OF THE CITY OF NEW YORK and as CHAIRMAN and TREASURER OF THE FIRE DEPARTMENT PENSION FUND (ARTICLE I) and the TRUSTEES of the FIRE DEPARTMENT PENSION FUND,

Defendants.

75 C. 602

AFFIDAVIT OF CONSTANTINE MONTAGNA

----------x

STATE OF NEW YORK)
) SS.:
COUNTY OF NASSAU)

CONSTANTINE MONTAGNA, being duly sworn, deposes and says:

1 I make the following allegations upon my own knowledge and information:

2. I am the plaintiff in the above entitled action.

3. I am a natural born citizen of the United States of America and have in my possession a birth certificate attesting to that fact. This is also a matter of record in the Fire Department of the City of New York which could easily have been discovered by the Corporation Counsel in lieu of its denial of knowledge or information to form a belief as to the truth of my being a citizen of the United States. As a matter of fact, the Corporation Counsel should know that one cannot be a member of the uniformed force of the Fire Department unless he is a citizen of the United

States. In any event, without belaboring this point, I am prepared to hand up for the Court's inspection my birth certificate as above stated for inspection.

4. I was appointed a uniformed fireman of the Fire Department on January 1, 1938 and became a member of Article I of the Pension Fund. Thereafter on or about December 24, 1960 I was promoted to the rank of Lieutenant in which latter capacity I continued to render active and full fire duties until March 16, 1962.

5. On March 17, 1962, I was physically examined by a doctor of the Fire Department Medical Board who diagnosed my condition as bi-lateral spurs of the oscalsis and certified me as unfit to render active and full fire duties; he did, however, recommend me as fit to perform "light duty" on the squad, commonly referred to as "LSS" or "Light Service Squad." The latter unit is one specifically established under the Administrative Code of the City of New York by Section B 19-4.0 et seq.

6. My physical condition not having improved, after numerous physical examinations by doctors of the medical board of the Fire Department, the last of which took place on November 25, 1968 (see Plaintiff's Exhibit "1" attached to the complaint) I was summarily retired from the Fire Department on an "Ordinary Disability" almost one year later on October 2, 1969, contrary to law, although I am advised by counsel that despite the decisions in the State Courts, to the contrary, under a different section of the New York State Constitution (Article V, Section 7) and alleged New York Administrative Code provisions, Plaintiff's

Exhibit "1" attached to the complaint, illegally retired me despite the fact that its language specifically provided, amongst other things, that "Condition is unchanged and it is our opinion that he be continued in Limited Service. x x x" (emphasis supplied).

7. Plaintiff, interpreting Breen v. Fire Department's Pension Fund, 299 N.Y. 8, as applying to non service-connected disabilities as well as to service-connected disabilities, brought an equity action with others for the relief demanded in Sarrosick to restore them to "light duty" after removing their illegal retirement. The State Court ruled otherwise and distinguished Breen from Sarrosick by holding that the former case applied only to permanent disabilities related only to service-related injuries but not to the type of injuries sustained by the Sarrosick plaintiffs (outside of service). Mr. Justice Fein's decision in Sarrosick is attached to the complaint as Plaintiff's Exhibit "2".

8. Plaintiffs in Sarrosick appealed to the Appellate Division which unanimously affirmed Trial Term and leave to appeal was thereafter sought and denied by the Court of Appeals.

9. Thus, all avenues of redress on the central issue having been exhausted in the State Courts on a different issue from that raised in the instant action, i.e. Article 5, section 7 of the New York State Constitution pleaded only in Sarrosick against the Equal Protection of the Law clause to the Fourteenth Amendment of the United States Constitution, I now resort to what I consider to be

my rights under the Federal Constitution. (See "Questions Presented" in "Memorandum of Law" at p. 8, submitted herewith.

10. I have also attached as Plaintiff's Exhibit "3" to the affidavits accompanying the motion for summary judgment copies of the complaint and the answer in Sarrosick so that the Court may examine the allegations and determine that no claim is made in that pleading for relief except under Article V, section 7 of the United States Constitution and the pertinent provisions of the Administrative Code, while the relief in the instant pleading is predicated on a different cause of action. I do wish at this time to respectfully direct this Court's attention to the "Answer" in Sarrosick which does not therein show in its paragraph "Third" a denial of paragraph "TWELFTH" of the complaint. This is not a deliberate omission because when defendants, at a later date, moved to amend the answer to show a denial of paragraph "TWELFTH," the motion was granted but a formal amended answer was never served. It was agreed, however, and the lower court was so informed at the Sarrosick trial that the proposed amended answer already served be deemed to include a denial of paragraph "TWELFTH." So, for all intents and purposes, that was the understanding and effect of the amendment and the Court was so informed as more fully appears in the record below.

11. Plaintiff's Exhibit "4" is attached to the motion papers because it will prove that the provisions in the "Administrative Separation of Limited Service Personnel from the Fire Department" run counter to the pertinent Administrative Code Provisions which rests authority

Affidavit of Constantine Montagna in Support of Motion

only in the Medical Board to certify as disabled fireman from rendering duty on the LSSquad and not the Fire Commissioner pursuant to Budget authority in the absence of such medical certification.

12. Finally, there will be handed up under separate cover because of its bulkiness the full testimony of the witnesses, Chief Muller, Lieut. Montagna and Lieut. Doherty who testified fully on direct and cross-examination. And, although my counsel has reproduced these minutes of the trial, he will certify these minutes as true copies by the New York County Clerk's office in an attempt to further assist the Court for comparison purposes if so desired.

WHEREFORE, I respectfully pray that summary judgment issue in my favor against the defendants.

LINDA LITKA
Notary Public, State of New York
No. 52-4521722
Qualified in Suffolk County
Certificate filed in Nassau County
Term Expires March 30, 1976

CONSTANTINE MONTAGNA

Sworn to before me this

15th day of August, 1975

AFFIDAVIT OF HOWARD C. FISCHBACH IN SUPPORT OF MOTION
(Filed August 18, 1975)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- -x

CONSTANTINE MONTAGNA,

Plaintiff,

-against-

JOHN T. O'HAGAN, as FIRE COMMISSIONER OF THE CITY OF NEW YORK, and as CHAIRMAN and TREASURER of the FIRE DEPARTMENT PENSION FUND (ARTICLE I) and the BOARD OF TRUSTEES of the FIRE DEPARTMENT PENSION FUND,

Defendants.

75 C 602

AFFIDAVIT OF HOWARD C. FISCHBACH

- -x

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

HOWARD C. FISCHBACH, being duly sworn, deposes and says:

1. I am a member of the New York Bar, admitted to practice since March 7, 1927 and am also a member of the bar of the above Court.

2. I make this affidavit based on my own knowledge of all of the facts herein and by reason of the fact that I have known the plaintiff for many years and have also acted as his counsel not only in this Court but in his behalf while a co-plaintiff in Sarrosick et al. v. Lowery et al., a matter which was tried by me in the New York State Supreme Court, New York County. There, Mr. Justice Fein found for the defendants after which this plaintiff and others appealed to the Appellate Division.

3. Having lost the appeal unanimously in the Appellate Division, First Department, I was authorized to

seek leave to appeal to the Court of Appeals which also denied the relief sought.

4. I stated in my papers, pleadings and in open Court, that the thrust of the State Court action was not an Article 78 proceeding but was one fashioned in equity.

5. All of plaintiff's exhibits attached to the motion papers herein, including the minutes separately submitted, but not attached to the motion papers are true and accurate xerox copies of documents in evidence at the trial of Sarrosick et al., v. Lowery et al. These documents, including Justice Fein's decision, made up the Appendix Record on Appeal to the Appellate Division, First Department, and so much of it is used as, in counsel's opinion, is necessary to determine the issues of law involved in the instant action and to put at rest any question of doubt as to the claimed specious denials by comparison of the two complaints and answers on question concerning plaintiff Montagna only.

6. An examination of Plaintiff's Exhibit "2" attached to the instant complaint as the opinion of Mr. Justice Fein at Trial Term in the State Court action in Sarrosick which, in capsule form, stated:

> "The relief sought requires the determinations of the defendants available only in an Article 78 proceeding. However, plaintiffs x x x have expressly stated that they do not seek Article 78 review. They assert that they have causes of action in equity on the basis of alleged contracts entitling them to specific performance. x x x No cases have been found and none have been cited to the court granting the of relief sought in an equity action. x x x." (emphasis supplied)

7. The oral argument and the brief particularly emphasized that the contract relationship urged in the State Courts was supported by enforcement in equity (Art. V, Section 7 of the N.Y. State Constitution) in an action for specific performance in citing Underhill v. Valentine, 207 App. Div. 778 and City of Buffalo v. International Railway Co., 135 Misc. 504, aff'd 232 A.D. 868.

8. The instant case seeks relief for plaintiff's reinstatement to the position he held before his retirement, i.e. "light duty" by reason of the Equal Protection of the Law clause under the Fourteenth Amendment of the U.S. Constitution and its companion State Constitution, Article 1, sec. 11.

9. Neither the pleadings in the Sarrosick case nor Justice Fein's decision referred to the Fourteenth Amendment or Art. 1, sec. 11 of the State Constitution. The briefs cite cases where the test applied refers to whether or not the pleadings or the Court ruled on these Constitutional points. If not, as the instant case shows, beyond a shadow of doubt, then the defendants' defense of res judicata must fail.

10. That part of paragraph "2" which is denied is one of law for this Court to decide. What defendants admit are the allegations that plaintiff's claim is predicated under Title 42, U.S. Code, Section 1983 and that the matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.

11. Paragraph "3" of the complaint alleges plaintiff to be a citizen of the United States.

The defendants answer alleging no knowledge or information as to this allegation is not only specious but intentionally asserted when, in fact, as an Assistant Corporation Counsel she knows that none except citizens of the United States may hold a Fireman's job in the City of New York and especially when his records are within the possession of the Fire Department and have been there within easy reach for the entire 31 years he was on the job and thereafter. Does he have to bring a birth certificate or baptismal record of his under the circumstances of his employment as a civil servant for so many years.

12. The allegations of the complaint in paragraphs "4", "5", "6", "7" and "8" are admitted.

13. Paragraph "9" of the complaint is denied but defendants refer the Court to Section B 19-4.0 of the Administrative Code of the City of New York for its full content and legal effect. These paragraphs are matters of law for the Court to interpret.

14. Defendants denial of paragraph "10" of the complaint is specious because examination of the Montagna's pension file in defendants' possession will show that plaintiff's retirement took place under the guise of Section B 19-4.0, subdivision a, paragraph 4.

15. Defendants' denial of paragraph "11" of the complaint is also specious because a reading of plaintiff's Exhibit "1" speaks for itself as a matter of fact and law and shows otherwise.

16. Defendants' denial of part of paragraph "12" also speaks for itself and is contrary to the

interpretation placed thereon by the defendants; the balance of the allegations are concerned with matters of law for the Court's attention and decision.

17. Defendants deny only that part of paragraph "13" of the complaint which asserts that action in Sarrosick, et al. v. Lowery et al. was properly commenced in equity. (This aspect of the allegation was answered in " hereof.)

18. Defendants cover by blanket denials paragraphs "14" - "20". Each of these denials is false and without merit because a mere examination of the transcript of the record in the earlier trial and the very own records of the Fire Department will prove them so.

19. Plaintiff intends to produce on the argument of the motion for summary motion the pertinent testimony which will show the real facts as coming out of the mouths of the Fire Departments personnel and the records of the Department itself. This will establish defendants' allegation in the instant action as completely specious, without merit and with intent to deceive the Court in a devious effort to deprive plaintiff of his just and constitutional rights.

HOWARD C. FISCHBACH

Sworn to before me this
15 day of August, 1975

LINDA LUTEA
Notary Public, State of New York
No. 52-4521722
Qualified in Suffolk County
Certificate filed in Nassau County
Commission Expires March 30, 19 76

EXHIBITS ANNEXED TO FOREGOING AFFIDAVITS

EXHIBIT 1 - LETTER OF FIRE DEPARTMENT DATED NOVEMBER 25, 1968 JA14

Letter of Fire Department, dated Nov. 25, 1968

Re: Lieut. Constantine Montagna

ROBERT O. LOWERY

PET 1

CITY OF NEW YORK
FIRE DEPARTMENT

Pr Deputy Fire Commr
Asst Chief for Veterans
Thomas J Hartnett

MEDICAL DIVISION
278 SPRING STREET
NEW YORK, N.Y., 10013
ALgonquin 5-3226

Nov. 25, 1968.

TO: Robert O. Lowery, Fire Commissioner.
FROM: Gabriel P. Seley, Chief Medical Officer.
SUBJECT: Medical re-evaluation of member.

// Lieut. Constantine Montagna, LS, Farm Assignment and Planning Unit, appeared for medical re-evaluation. The minutes are as follows:

Lieut. Montagna appears for re-evaluation LS status. He was placed on limited service because of bilateral spurs of os calsis. Still has pain in heels if he is on his feet for any period of time. Condition is unchanged and it is our opinion that he be continued in Limited Service. This is non-service connected.

The committee at this examination was Medical Officers Robinson-Connell-Seley.

Respectfully submitted,
[illegible]
Chief Medical Officer.

GPS/mc

[illegible]

[illegible]

SUPREME COURT
[illegible]

EXHIBIT 2 - DECISION BY FEIN, J. (NEW YORK SUPREME COURT IN SARROSICK V. LOWERY) (P. JA15-JA23)

DECISION

SARROSICK, et al.

v.

LOWERY, et al.

ARNOLD L. FEIN, J.:

In this equity action, plaintiffs, retired uniformed fire officers of the New York City Fire Department, sue the Fire Commissioner in that capacity and as Chairman and Treasurer of Fire Department Pension Fund (Article I), and as Chairman of Fire Department Pension Fund (Article IB), and the Board of Trustees of the Fire Department Pension Funds, for specific performance requiring that: (1) the retirement of each plaintiff on non-service connected disability be declared null and void; (2) each plaintiff be restored to employment in the Fire Department until mandatory retirement age, and be assigned to perform "light duty" until mandatory retirement age or sooner if the Medical Board prior thereto certifies that any one of them could assume active fire duties; (3) each plaintiff recover of the defendants differentials of wages between their allotted retirement allowances and full pay for the periods of their respective retirements to date.

DECISION

The relief sought requires a review of the determinations of the defendants available only in an Article 78 proceeding. However, plaintiffs, through their counsel, have expressly stated that they do not seek Article 78 review. They assert that they have causes of action in equity on the basis of alleged contracts entitling them to specific performance. They rely upon the State Constitution and Administrative Code provisions and the cases interpreting them holding that the retirement systems create vested contractual rights. They assert such rights may be enforced by specific performance. No cases have been found and none have been cited to the court granting the kind of relief sought in an equity action. To the extent that such relief has been granted it has been afforded in Article 78 proceedings only. However, since this issue is not raised by defendants and it is now clear that the court is authorized to grant the relief to which a party is entitled even though the form of action is improper, the action will be considered on the merits.

All of the plaintiffs were members of either Article I or Article II of the Fire Department Pension Funds. They testified in substance, and the evidence

DECISION

supports the conclusion, that each of the plaintiffs became disabled, that they were examined by appropriate Medical Boards and found qualified for "light duty" or "L.S.S.". As to each, the determination was that the disability was non-service connected. Each of the plaintiffs testified, over objection, that at the time of their respective disabilities and their medical examinations by the Medical Boards they were led to believe and lulled into the conclusion that if they did not pursue their alleged claims that their disabilities were service-connected, that the Medical Boards would recommend that they were fit for "light duty" or "L.S.S." and that the Fire Department would proffer to them such duties until mandatory retirement age of sixty-five years. They contend that by reason of such representations made by various superiors in the chain of command in the Department, and their acceptance and satisfactory performance of "light duty" or "L.S.S." a contract was created obligating defendants to continue them on "light duty" or "L.S.S.", until such time as an appropriate Medical Board should find them unfit for "light duty" or "L.S.S." or fit for regular fire duty. They appear to concede that if the Medical Boards were to find them unfit

DECISION

for "light duty" or "L.S.S." the actions of the defendants in retiring them on ordinary disability would be appropriate.

Although the evidence hardly supports a conclusion that contracts were attempted to be made and it is doubtful that the officials of the Department who made the alleged promises or inducements had power to bind the defendants to such contracts, it is not necessary to pass upon this question.

Assuming, without deciding, that the representations and promises were made, and that the plaintiffs relied upon them, it must be concluded that the plaintiffs are not entitled to the relief they seek. For some period of time after they were found unfit for regular fire duty, but qualified for "light duty" or "L.S.S.", each of the plaintiffs was assigned to and served the Department in such capacity. However, at or before the time of the retirements here in question, each was examined by appropriate Medical Boards. Upon application of defendant Commissioner, the Boards approved the applications of the Commissioner to retire them on ordinary disability. In their reports the Boards stated as to each that he had "a permanent partial disability and may

engage in a suitable sedentary occupation". (Emphasis supplied). Plaintiffs seize upon the reference to a "sedentary occupation" and assert it amounts to a determination that they were qualified for and should be assigned to "light duty" or "L.S.S." and not retired.

They rely upon their alleged contracts and Administrative Code Sections B 19-4.0-a(4) and B 19-7.84. Section B 19-4.0-a(4) reads:

> "In case of partial permanent disability not caused in or induced by the actual performance of the duties of his position, which may occur after ten years' service in such department, the member so disabled may be relieved by the commissioner from active service at fires, but shall remain a member of the uniformed force, subject to the rules governing such force, and be assigned to the performance of such light duties as a medical officer of such department may certify him to be qualified to perform, or, if such member be retired after the expiration of ten years' service the annual allowance to be paid to such member shall be one-half of the annual compensation allowed such member at the date of his retirement from the service.

This section, relating to "partial permanent disability not caused in or induced by the actual performance of the duties of the position: in short to non-service connected partial permanent disability, authorizes the Commissioner to relieve such persons

DECISION

from active service at fires and to assign them to the performance of "such light duties as a medical officer of such department may certify him to be qualified to perform" or to retire them after ten years service at one-half pay. Each of the plaintiffs had more than ten years service.

Plaintiffs contend that this section must be read together with Section B 19-7.84 authorizing retirement for accident disability. However, this section relates only to a member "physically or mentally incapacited for the performance of city service, as a natural and proximate result of an accidental injury received in such city-service". Since there is no proof in this case that the plaintiffs sustained their disability "as a natural and proximate result of an accidental injury received in such city service", this subdivision is inapplicable.

Administrative Code, Section B 19-7.83 provides for retirement for ordinary disability upon the application of the Commissioner where a medical examination shows that "such member is physically or mentally incapacitated for the performance of duty and ought to be retired". This section relating to

DECISION JA21

disability which is not service-connected is the applicable section. Under the circumstances of this case, the appropriate Medical Boards having made such determination, the plaintiffs are not entitled to relief. The statements by the Medical Boards that plaintiffs "may engage in *** suitable sedentary occupation" were not findings that they were capable of or should be retained on a "light duty" or "L.S.S." status, in the face of the Boards' approvals of the Commissioner's application that they be retired on "ordinary disability".

Plaintiffs' reliance on Breen v. Fire Department's Pension Fund, (299 N Y 8) is misplaced. The Court of Appeals was construing Administrative Code Section B 19-4.0, subdivision a paragraph 2, applicable to service-connected disability, entitling the member to retention on "such light duties as a medical officer *** may certify him as qualified to perform". The court held, in accordance with the statute, that the petitioners could not be retired without their consent unless the Medical Board made a determination that they were unfit for "light duty" on the basis of a service-connected disability. No such requirement exists in the Administrative

DECISION

Code provisions applicable to non-service connected disabilities. Equally misplaced is plaintiffs' reliance on Peo. ex rel Cunningham v. Hayes, (66 Misc. 531), where the issue was whether the disability was service-connected. There is no such issue here. Whether a statement that plaintiffs "may engage in table sedentary occupation" amounts to a finding that they were qualified for "light duty", is therefore irrelevant.

In City of New York v. Schoeck, (294 N Y 559), relied on by defendants, the fire officer was found by the Medical Board to have a permanent partial disability and certified as unfit for normal duties. The court held that this finding required that he be retired. There was no issue as to light duty. The court directed the Board of Trustees to retire him, leaving for determination by the Board only whether upon such retirement he should receive 3/4 or 1/2 pay depending upon whether the disability was service-connected or non-service connected.

Since there is no issue here as to whether the disability was or was not service-connected, there is no right to "light duty". Moreover there is

Exhibit 2 - Decision by Fein, J. (New York Supreme Court in Sarrosick v. Lowery) (P. JA15-JA23)

DECISION

no finding of qualification for "light duty". Accordingly, it must be found that the retirement on ordinary disability was appropriate.

Accordingly defendants are granted judgment dismissing the complaint.

This is the decision required by CPLR 4213.

(Exhibits are in the part).

Dated: March 30, 1973

s/A.L.F.
J.S.C.

EXHIBIT 3 - COMPLAINT IN SARROSICK V. LOWERY (P. JA24-JA33)

VERIFIED COMPLAINT

- - - - - - - X

SAME TITLE

- - - - - - - X

The plaintiffs, by ISRAEL & LEEDS, complaining of the defendants, respectfully allege and show the Court:

FIRST: The plaintiffs are residents of the State of New York and citizens of the United States.

SECOND: At all the times hereinafter mentioned, the plaintiffs were duly appointed into the civil service Uniformed Fire Forces of the Fire Department of the City of New York and thus became, in certain specific instances, members of either one or the other of the Fire Department Pension Funds, Article 1 or Article IB.

THIRD: At variable times subsequent to their appointments as aforesaid, some of the plaintiffs took and passed civil service promotion examinations and thus attained superior ranks from Lieutenant to Battalion Chief, with total service in specific instances for periods between 16 and 31 years.

FOURTH: The defendant LOWERY is now the Fire Commissioner of the City of New York duly appointed as such according to law; and also the Chairman and

Treasurer of the FIRE DEPARTMENT PENSION FUND (ARTICLE I) as well as Chairman of the FIRE DEPARTMENT PENSION FUND (ARTICLE IB).

FIFTH: THE BOARD OF TRUSTEES OF THE FIRE DEPARTMENT PENSION FUNDS is composed of 12 members, including the Fire Commissioner of the City of New York.

SIXTH: THE BOARD OF TRUSTEES OF THE FIRE DEPARTMENT PENSION FUNDS is empowered by law to make valid decisions in respect to retirements of members of the Fire Department Pension Funds, both Articles I and IB, in strict accord with pertinent and appropriate provisions of the Administrative Code of the City of New York.

SEVENTH: Article 5, section 7, of the Constitution of the State of New York, in pertinent part, provides that "membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired." (emphasis supplied)

EIGHTH: In respect to membership in the FIRE DEPARTMENT PENSION FUND (ARTICLE I) so far as here pertinent, in part, provides:

VERIFIED COMPLAINT

"Section B19-4.0 Payment of pensions; disability; retirement for service. - a. The board of trustees shall retire any member who, upon an examination, as provided in subdivision d of this section, may be found to be disqualified, physically or mentally, for the performance of his duties. Such member so retired shall receive from such pension fund an annual allowance or pension as provided in this section. In every case such board shall determine the circumstances thereof, and such pension or allowance so allowed is to be in lieu of any salary received by such member at the time of his being so retired. The department shall not be liable for the payment of any claim or demand for services thereafter rendered, and the amount of such pension or allowance shall be determined upon the following conditions:

1. In case of total permanent disability at any time caused in or induced by the actual performance of the duties of his position, the amount of annual pension to be allowed shall be not less than three-fourths of the annual compensation allowed such member as salary at the date of his retirement.

2. In case of partial permanent disability at any time caused in or induced by the actual performance of the duties of his position, which disqualifies him only from performing active duty in the uniformed force, the member so disabled shall be relieved by the commissioner from active service at fires and assigned to the performance of such light duties as a medical officer of such department may certify him to be qualified to perform, or he shall be retired on his own application at not less than three-fourths of his salary at the date of his retirement from the service, on an examination, as provided by subdivision d of this section, showing that his disability is permanent.

3. In case of total permanent disability not caused in or induced by the actual performance of the duties of his position, which shall occur after the expiration of ten years' service in such department, the amount of annual pension to be allowed shall be one-half of the annual compensation allowed such member at the date of his retirement from the service.

4. In case of partial permanent disability not caused in or induced by the actual performance of the duties of his position, which may occur after ten years' service in such department, the member so disabled may be relieved by the commissioner from active service at fires, but shall remain a member of the uniformed force, subject to the rules governing such force, and be assigned to the performance of such light duties as a medical officer of such department may certify him to be qualified to perform, or, if such member be retired after the expiration of ten years' service the annual allowance to be paid to such member shall be one-half of the annual compensation allowed such member at the date of his retirement from the service.

5. In case of total permanent disability not caused in or induced by the actual performance of the duties of his position, which may occur before the expiration of ten years' service in such department, the amount of annual pension to be allowed shall be one-third of the annual compensation allowed such member at the date of his retirement from the service.

6. In case of partial permanent disability not caused in or induced by the actual performance of the duties of his position, which may occur before ten years' service in such department, the member so disabled shall be relieved by the commissioner from active service at fires, but shall remain a member of the uniformed force, subject to the rules governing such force, and be assigned to the performance of such light

duties as a medical officer of such department may certify him to be qualified to perform, or, if such member be retired before the expiration of ten years' service, the annual allowance to be paid to such member, shall be one-third of the annual compensation allowed such member at the date of his retirement from the service."

* * * * *

NINTH: In respect to membership in the Fire Department Pension Fund (Article IB), so far as here pertinent, in part, provides:

"Section B19-7.83 Retirement; for ordinary disability. - Medical examination of a member in city-service for ordinary disability shall be made upon the application of the commissioner, or upon the application of such member or of a person acting in his behalf, stating that such member is physically or mentally incapacitated for the performance of duty and ought to be retired. If such medical examination shows that such member is physically or mentally incapacitated for the performance of duty and ought to be retired, the medical board shall so report and the board shall retire such member for ordinary disability not less than thirty nor more than ninety days after the execution and filing of application therefor with the pension fund. (As added by L.L. 1941, No. 53, August 29.)"

"Section B19-7.84 Retirement; for accident disability. - Medical examination of a member in city-service for accident disability and investigation of all statements and certifications by him or on his behalf in connection therewith shall be made upon the application of the commissioner, or upon the application of a member or of a person acting in his behalf, stating that such member is physically or mentally incapacitated

for the performance of city-service, as a natural and proximate result of such city-service, and certifying the time, place and conditions of such city-service performed by such member resulting in such alleged disability and that such alleged disability was not the result of wilful negligence on the part of such member and that such member should, therefore, be retired. If such medical examination and investigation shows that such member is physically or mentally incapacitated for the performance of city-service as a natural and proximate result of an accidental injury received in such city-service while a member, and that such disability was not the result of wilful negligence on the part of such member and that such member should be retired, the medical board shall so certify to the board, stating the time, place and conditions of such city-service performed by such member resulting in such disability, and such board shall retire such member for accident disability forthwith. (As added by L.L. 1941, No. 53, August 29.)"

..NTH: Upon information and belief, although all plaintiffs herein sustained physical injuries and one (1) plaintiff also sustained mental injuries, in the actual performance of their civil service duties which rendered them, in appropriate instances, either physically or mentally unfit for the performance of fire duties within the meaning and intent of the pertinent provisions of the Administrative Code of the City of New York and of the Fire Department's Rules and Regulations, each of them was induced or

lulled by the Fire Department into a sense of security to accept in compromise, its recommendations and assignments of "light duty" and to be relieved from active service at fires until each of them reached mandatory retirement age; or sooner, if upon a finding by the Medical Board that he could then assume active fire duties; that such promises and/or inducements were predicated upon conditions encompassing certifications by the Medical Board that each plaintiff (a) was qualified to perform "light duty", (b) was willing to remain with the Fire Department and waive his rights to apply for a three-fourths service-connected disability and, (c) would accept in lieu thereof findings by the Medical Board of disqualification on account of partial permanent disability in non-service performance of duties but qualified to perform "light duty", sedentary in character.

ELEVENTH: In each case, the Fire Department suggested to the Medical Board that if the latter would make its determination of non-service disabilities to render disqualification for the performance of fire duties but qualification of "light duties", the Fire Department would assign to the plaintiffs such "light duties"; thereafter, in each case, the

Medical Board made such determinations and recommendations to the Board of Trustees of the Fire Department Pension Funds and the latter accordingly adopted appropriate resolutions to effectuate the same.

TWELFTH: The plaintiffs at variable times, in accord with respective dates of their particular disabilities, accepted and relied upon the promises and/or inducements as aforesaid and thereupon began their performance of "light duty" for the periods from as early as April, 1956 and continuously thereafter without interruption until their compulsory and illegal retirements prior to attainment of mandatory retirement age, as hereinafter more fully stated, in spite of the fact that in each plaintiff's instance, findings and recommendations were made by the Medical Board that each was able to continue performance of sedentary work as theretofore; accordingly, in reliance of the factors outlined in paragraphs of this complaint numbered "TENTH" and "ELEVENTH", the plaintiffs waived their rights to apply for service-connected disability reitrement.

THIRTEENTH: That in respect to plaintiffs, RAYMOND S. SARROSICK, CONSTANTINE MONTAGNA, TIMOTHY A. O'CONNOR, PETER B. BEKISZ, ROBERT M. REILLY, all

effective October 2, 1969; as to plaintiff, EDWARD T. MALONE, effective October 4, 1969; as to plaintiff, LOUIS SHAENER, effective July 14, 1970; and as to plaintiff, JAMES J. BURNS, effective August 30, 1970; each of them was retired for non-service incurred disability prior to attainment of mandatory retirement age.

FOURTEENTH: That the assignments to plaintiffs of "light duty" and their ability to continue such after their compliance with all of the stated considerations, as aforesaid, the subsequent breach thereof by the Fire Department, in illegally retiring each plaintiff prior to mandatory retirement age on non-service incurred disability, was a clear impairment of their constitutional rights under Article 5, section 7 of the New York State Constitution.

FIFTEENTH: That plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs demand judgment that:

(a) the defendants and each of them be directed to specifically perform the constitutional contracts herein;

(b) the retirement of each plaintiff on a non-service disability be declared null and void;

VERIFIED COMPLAINT

that they be restored to employment in the Fire Department of the City of New York until mandatory retirement age, as provided by law; that each plaintiff be assigned to perform "light duty" until mandatory retirement age or sooner, if the Medical Board prior thereto certifies that anyone of them could assume active fire duties;

(c) each plaintiff do recover of the defendants differentials of wages between their alloted retirement allowances and full pay for the whole of the periods from the effective dates of their respective retirement to date;

(d) should there develop an issue of fact herein, that plaintiffs be accorded a trial by Jury thereon;

(e) each plaintiff have such other and further relief as may be just and proper together with interest, costs and disbursements of this action.

ISRAEL & LEEDS
Attorneys for Plaintiffs
Office & P.O. Address
170 Broadway
New York, N.Y. 10038
Tel. No.: 964-0914

[Verified by
Raymond S. Sarrosick
Constantine Montagna
Timothy A. O'Connor
Louis Shaener
Peter B. Bekesz
Edward T. Malone
Robert M. Reilly
James J. Burns]

Sworn to
November 10th, 1970

EXHIBIT 4 - ADMINISTRATIVE SEPARATIONS LIMITED SERVICE PERSONNEL FROM THE FIRE DEPARTMENT (P. JA34-JA45)

May 1969

ADMINISTRATIVE SEPARATIONS OF LIMITED SERVICE PERSONNEL FROM THE FIRE DEPARTMENT

JA35

ADMINISTRATIVE SEPARATIONS FROM THE NEW YORK FIRE DEPARTMENT LIMITED SERVICE PERSONNEL

I. PURPOSES

A. General - To maintain the number of members recommended for Limited Service by the Fire Department Medical Board or performing duty in Limited Service Category within the Quota agreed to by the Fire Department and the Office of the Budget Director as expressed in Budget Certifications.

B. Specific -

1. To establish a particular time at which such members must be evaluated for administrative separation from the Department.

2. To establish a criteria which will assist the Fire Commissioner in making decisions relative to Administrative Separations from the Department.

II. G U I D E L I N E S

A. Definitions -

1. Limited Service - Disqualification from performance of active service because of injury or illness; which is certified as permanently disabling by a Fire Department Medical Board but which does not prevent performance of other than active fire-fighting duties.

2. Administrative Separation - The processing of retirement of a member on orders of the Fire Commissioner in accordance with the provisions of Chapter 19 - Title B of the Administrative Code.

3. Controlling Date - The controlling date for evaluation of Administrative Separation shall be the date on which the injury or illness, causing permanent disability occurred, not the date on which the member was officially placed in Limited Service Status on Department Order.

4. Longevity Credit - A credit expressed in months or years, granted to a member, which permits an extension of time for service in the Fire Department. Such credit is related to the length of members prior full duty service, as established by the controlling date.

5. Unfit for any Duty - A certification by the Fire Department Medical Board that the illness or injury, which is permanently disabling, prohibits the performance of any type duty in the Department by the member.

6. Service Connected - A certification by the Fire Department Medical Board that such illness or injury, which is permanently disabling, resulted from performance of duty.

7. Non-Service Connected - A certification by the Fire Department Medical Board that such illness or injury, which is permanently disabling, did not result from the performance of duty.

8. Fire Department Medical Board - A Board which consists of three (3) or more Medical Officers of the Department who are designated such duty by the Chief Medical Officer.

III. CRITERIA FOR ADMINISTRATIVE SEPARATION

A. The Fire Department recognizes that the period of time served in full duty status should be considered in determining the point at which a member recommended for or performing Limited Service Duties must be evaluated for Administrative Separation from the Department.

B. If a member performs over twenty (20) years of full duty service as established by the controlling date, prior to being recommended for Limited Service Status, a longevity credit of one year for each year or part thereof of full duty service over twenty (20) years will be granted before evaluating for Administrative Separation.

C. If a member performs over ten (10) years but less than twenty (20) years of full duty service, as established by the controlling date, a longevity credit of an appropriate number of months of service from the controlling date will be granted.

C. (Ct'd)

This longevity credit will be determined as follows: The number of members' years of full duty service, minus ten (10) years, multiplied by 1.2, equals the number of months of longevity credit to be granted.

Example - The controlling date of injury or illness which caused member to be recommended for Limited Service occurred during the members' 15th year of service in the Department.

15 years - 10 years multiplied by 1.2, equals six (6) months of longevity credit from controlling date.

D. If a member performs less than 10 years of full duty service, as established by the controlling date, the following will be applicable:

1. Under eight (8) years of service - member shall be processed for retirement upon receipt of recommendation from the Medical Board for Limited Service.

2. Over eight (8) years but under ten (10) years of service - members shall be retained until completion of 10 years of service, at which time he shall be retired from the Department.

E. Longevity credits are not mandatory and can be denied by the Fire Commissioner for reasonable cause or waived by the member concerned.

F. Table - Administrative Separations

*Years of full Duty Service	*Projected Time of other Than Full Duty Service
Over twenty (20) years	One (1) year for each or part thereof of over twenty (20) years of Service.
Ten (10) to twenty (20) years	Number of months as illustrated in longevity formula.
Eight (8) to ten (10) years	Retained until ten (10) years of Service Completed
Under eight (8) years	N O N E

*Based on controlling date

IV. EXCEPTIONS TO CRITERIA

A. Service Connected Disability - No member shall be administratively separated from the Department if his injury or illness has been certified as service connected by the Fire Department Medical Board, unless he is incapable of performing any form of Light Duty.

B. Service Consideration - When a member has achieved thirty-two (32) years of service and can perform thirty-five (35) years of service prior to reaching his 65th birthday, such member shall be permitted to remain in service until he completes his thirty-five (35) years of service.

C. Terminal Illness - When a member is suffering from a terminal illness with a poor prognosis as certified by the Chief Medical Officer, such member shall be permitted to remain in Service.

D. Job Performance - When a member has performed his assigned duties in a superior fashion and is presently performing in an essential assignment, such member shall be permitted to remain in service with the approval of the Fire Commissioner. The quality of job performance and essentiality of assignment shall be documented by the Chief in Charge, Bureau of Personnel & Administration and made the subject of a Recommendation Report to the Fire Commissioner.

D. (Ct'd)

The job performance evaluation shall consider the members' performance in full duty and Limited Service Status.

E. Mandated Physical Examinations - When a member is placed in Limited Service as a result of such examination to determine fitness for a specialized position in the Department, such member shall be permitted to remain in service. (Typical examples are - Super Pumper personnel, engine chauffeurs, ladder chauffeurs).

F. Promotional Opportunities - When a member on a promotional list and in a limited service status is reached for promotion for a higher rank and elects to accept such promotion, the member shall be promoted and processed for separation immediately. The member shall not be separated until he has been offered the promotional option.

G. Medical Record - A member shall be separated, except in cases of terminal illness, when his non-service connected medical leaves are excessive, this history to be documented by the Bureau of Personnel and Administration and made the subject of a recommendation Report to the Fire Commissioner. Non-Service connected medical leaves shall be considered excessive utilizing the following standard:

G. (Ct'd)

When the number of days on medical leave exceeds the total days reached by multiplying the years of service in the Fire Department by twelve (12).

H. Benefit Grant - A member's retirement date may be postponed for a maximum period of two (2) months if it would allow the member to increase his pension benefit by permitting him to reach his anniversary date of appointment or promotion in the Department or reach the effective date of new salary increases obtained through labor negotiations.

I. Quota Privilege - When L.S. personnel in service does not exceed L.S. quotas for a specific rank at the time of the L.S. evaluation, all such members serving in such rank and duty category shall be continued in service.

V. REVIEW AND NOTIFICATION

A. In accordance with the foregoing, all limited service personnel shall be reviewed concurrently once each year, at the start of the calendar year, to determine whether they should be evaluated for Administrative Separation.

B. The Chief in Charge of the Bureau of Personnel and Administration notify the Commanding Officer of the member to be administratively separated from the Department and the member concerned as to the Department's decision relative to his duty status. This to permit the necessary training of replacements and allow the member to make the necessary adjustments within his personal life.

Exhibit 4 - Administrative Separations Limited Service Personnel from the Fire Department (P. JA34-JA45)

VI. EXEMPTION CLAUSE

In any of the situations as outlined in this document, extenuating circumstances may be presented, which in the opinion of persons so presenting, which may sufficiently alter the situation to receive consideration for retention in service.

Such circumstances shall be in the form of a report to the Chief in Charge, Bureau of Personnel & Administration, who shall evaluate such report and make appropriate recommendations to the Fire Commissioner.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

75C 602

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CONSTANTINE MONTAGNA,

Plaintiff,

-against-

JOHN T. O'HAGAN, as FIRE COMMISSIONER OF THE CITY OF NEW YORK and as CHAIRMAN and TREASURER OF THE FIRE DEPARTMENT PENSION FUND (ARTICLE I) and the BOARD OF TRUSTEES OF THE FIRE DEPARTMENT PENSION FUND,

Defendants.

CIVIL ACTION NO.

SUMMONS

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To the above-named defendants:

YOU ARE HEREBY SUMMONED and required to serve upon HOWARD C. FISCHBACH, plaintiff's attorney, whose address is 78-15 221st Street, Flushing, New York 11364, an answer to the complaint which is herewith served upon you within twenty (20) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Frank Doyle
CLERK OF THE COURT

Dated, October 1975

Marilyn Abela
Deputy Clerk

VERIFIED COMPLAINT IN MONTAGNA V. O'HAGAN

(P. JA47-JA57)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

CONSTANTINE MONTAGNA,

Plaintiff,

-against-

JOHN T. O'HAGAN, as FIRE COMMISSIONER OF THE CITY OF NEW YORK and as CHAIRMAN and TREASURER OF THE FIRE DEPARTMENT PENSION FUND (ARTICLE I) and the BOARD OF TRUSTEES OF THE FIRE DEPARTMENT PENSION FUND,

Defendants.

----------x

75C 602

CIVIL ACTION NO.

COMPLAINT

The plaintiff, CONSTANTINE MONTAGNA, by his attorney, HOWARD C. FISCHBACH, respectfully represents unto this Honorable Court as follows:

1. The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1343.

2. Plaintiff's claim is predicated upon the provisions of Title 42, United States Code, Section 1983, in that he was wrongfully retired from his employment as Lieutenant in the Uniformed Fire Forces of the Fire Department of the City of New York, in violation of his rights as a citizen of the United States, under the Constitution of the United States, specifically, but not limited to, his rights to Equal Protection of the Laws pursuant to the Fourteenth Amendment thereto and the Constitution of the State of New York, Article I, Section 11. The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand ($10,000.00) dollars.

3. Plaintiff is a citizen of the United States and resides in East Williston, Long Island, New York, which is within the jurisdiction of this Court.

4. At all material times alleged in this complaint, plaintiff was duly appointed into the Civil Service Uniformed Fire Forces of the Fire Department of the City of New York on January 1, 1938, at which time he chose to become and did become a member of Article I of the Fire Department Pension Fund.

5. Subsequent to his appointment as aforesaid, plaintiff passed a civil service promotion examination and thus attained the rank of Lieutenant, with service in the Fire Department of the City of New York totaling 31 years.

6. At all times alleged in this complaint, one, ROBERT O. LOWERY, was then duly appointed Fire Commissioner of the City of New York, and simultaneously, among other things, also became Chairman and Treasurer of Article I of the Fire Department Pension Fund, pursuant to law; the present defendant, JOHN T. O'HAGAN, is the successor to the now retired ROBERT O. LOWERY, and thus presently occupies all of the positions in the Fire Department of the City of New York formerly held by the latter also pursuant to law.

7. At all material times alleged in this complaint, defendant BOARD OF TRUSTEES OF THE FIRE DEPARTMENT PENSION FUND, ARTICLE I, is composed of 12 members, including the Fire Commissioner of the City of New York.

8. Defendant BOARD OF TRUSTEES OF THE FIRE DEPARTMENT PENSION FUND, ARTICLE I, is empowered by law to make valid decisions in respect to retirements of members of said

Fund in strict accord with the pertinent and appropriate provisions of the Administrative Code of the City of New York.

9. The Administrative Code of the City of New York provisions of the FIRE DEPARTMENT PENSION FUND, ARTICLE I, in pertinent parts, read as follows:

> "SECTION B19-4.0 Payment of pensions; disability; retirement for service.---
> a. The board of trustees shall retire any member who, upon an examination, as provided in subdivision d of this section, may be found to be disqualified, physically or mentally, for the performance of his duties. Such member so retired shall receive from such pension fund an annual allowance or pension as provided in this section. In every case such board shall determine the circumstances thereof, and such pension or allowance so allowed is to be in lieu of any salary received by such member at the time of his being so retired. The department shall not be liable for the payment of any claim or demand for services thereafter rendered, and upon the following conditions: (emphasis supplied)
>
> ***
>
> "2. In case of partial permanent disability at any time caused in or induced by the actual performance of the duties of his position, which disqualifies him only from performing active duty in the uniformed force, the member so disabled shall be relieved by the commissioner from active service at fires and assigned to the performance of such light duties as a medical officer of such department may certify him to be qualified to perform, or he shall be retired on his own application at not less than three-fourths of his salary at the date of his retirement from the service, on an examination, as provided by subdivision d of this section, showing that his disability is permanent." (emphasis supplied)
>
> ***
>
> "4. In case of partial permanent disability not caused in or induced by the actual performance of his duties of his

position, which may occur after ten years' service in such department the member so disabled may be relieved by the commissioner from active service at fires, but shall remain a member of the uniformed force, subject to the rules governing such force, and be assigned to the performance of such light duties as a medical officer of such department may certify him to be qualified to perform, or ***."
(emphasis supplied)

"Section B19-4.0 - e. The board of trustees shall have the power to grant, award or pay a pension on account of physical or mental disability or disease, only upon a certificate of a medical board or a special medical board after examination as provided in subdivision d of this section. Such certificate shall set forth the cause, nature and extent of the disability, disease or injury of such member." (emphasis supplied)

10. On or about February 23, 1962, the Medical Board of the Fire Department of the City of New York physically examined plaintiff and found him to be suffering from a partial permanent disability not caused in the performance of his duties and which was diagnosed as bilateral spurs of the oscalsis with a prognosis that he would be unable to perform full fire duty; however, said Medical Board made its recommendation at the same time that plaintiff be assigned to the LIGHT SERVICE SQUAD, more briefly referred to as LSS -- all of the foregoing, apparently under authority of Administrative Code section B19-4.0, subdivision a, paragraph 4.

11. Periodically thereafter, plaintiff was required and did submit himself to physical examination by the Medical Board for re-evaluation of his physical condition and his

LSS status, the last of which took place in 1968 and which led to the Fire Department's Medical Division letter of November 25, 1968; annexed hereto as Plaintiff's Exhibit "1" is a copy of that letter which, in substance, certifies that plaintiff still has pain in his heels due to bilateral spurs of the oscalsis, but, nevertheless, recommends that he be "continued" in Limited Service. (emphasis supplied)

12. Despite the affirmative and positive action by the Medical Board in recommending plaintiff's continuance of his LSS duties as aforesaid and without further required medical examination at any time thereafter certifying him as "unfit" to perform any duty, particularly LSS duty, the Fire Commissioner of the City of New York arbitrarily, illegally and unconscionably retired him, allegedly and/or apparently under the provisions of the Administrative Code of the City of New York, contrary to Section B19-4.0 a. subparagraph 4, contrary to decisional and statutory law and more particularly contrary to the "equal protection of the laws" provisions of the Fourteenth Amendment, Section I, of the Constitution of the United States and Article I, Section 11 of the New York State Constitution.

13. Heretofore, certain other persons, including this plaintiff, commenced an equity action in the New York State Supreme Court entitled SARROSICK, et al. LOWERY, et al., (not officially reported below), affirmed without opinion 352 NYS 2d 418 and leave to appeal denied 34 NY 2d 514. Trial term had rendered judgment dismissing the complaint against all plaintiffs, two of whom had been members of Article I of the Pension Fund and the others members of

Article IB. In that action plaintiffs there had sought to (a) preserve and enforce their constitutional contractual rights created by Article 5, Section 7 of the New York State Constitution and the pertinent Administrative Code provisions applicable to their membership in either Article I or IB of the Fire Department Pension Funds; (b) declare null and void their retirement on so-called non service-connected disabilities; (c) re-assigning them to light duty which they rendered immediately prior to their retirements until reaching retirement age of 65 years; and, (d) granting them differentials of wages between their respective allowances and full pay for their effective period of such retirements.

14. At the trial of the issues of fact and law in SARROSICK, no part of that action pleaded a violation of the Fourteenth Amendment, Section 1 and the trial judge in his decision made no reference to this but confined himself to the issues of fact and his interpretation of the appropriate Administrative Code provisions and certain cited cases in the briefs submitted which he held to be misplaced. (For the convenience of this Court, a copy of Mr. Justice Fein's decision at Trial Term is annexed hereto as Plaintiff's Exhibit "2")

15. The thrust of the New York State Supreme Court action in SARROSICK was directed exclusively upon issues of fact arising out of contractual constitutional rights conferred by Article 5, Section 7 of the New York State Constitution, and with respect to the law on BREEN v. FIRE DEPARTMENT PENSION FUND, 299 NY 8 and Peo. ex. rel. CUNNINGHAM v. HAYES, 66 Misc. 531; no relief was then sought under

the Fourteenth Amendment, Section 1 of the United States Constitution or under Article I, Section 11 of the New York State Constitution.

16. During the trial in SARROSICK, the uncontroverted proof thereat showed that (a) plaintiff in this case was then 59 years old; (b) he was separated from the Fire Department by retirement on October 2, 196[illegible] on a non-service-connected disability; (c) he was a member of Article I of the Pension Fund; (d) he served commendably on the LS Squad from February 23, 1962 to the date of his retirement; and (e) he was never physically examined after November 25, 1968, but on the contrary, when last examined, was recommended for continuance to perform his LSS duties with absolutely no certification whatsoever that he was unfit to perform any duty as required by law before effective retirement could take place.

17. Acting Lieutenant ANDREW T. DOHERTY, defendant's own witness, testified at the trial and revealed the irregular procedures and circumstances followed (and was unable to explain them) surrounding this plaintiff's retirement in the face of the letter of November 25, 1968, (Plaintiff's Exhibit "I") which unequivocally showed plaintiff's physical condition to be unchanged and contained a recommendation that he be continued in Limited Service.

18. The Chief in Charge of the Bureau of Personnel of the Fire Department, BERNHARD J. MULLER, testified with great reluctance in plaintiff's favor on two vital issues, to wit, that (a) retirements of Article I members are made on a QUOTA basis established by the Bureau of the Budget of

the City of New York and not under the RULES as referred to in the retirement statute Section B19-4.0, subdivision a, paragraph 4 of the Administrative Code, and (b) without a CERTIFICATE of our own MEDICAL BOARD, a member may not be retired under Article I (none could be found by the department applicable to plaintiff) except the positive certification to continue him in LSS duties as referred to in Plaintiff's Exhibit "1".

19. No real distinctions exist, as ruled contrariwise by Mr. Justice Fein in SARROSICK between Section B19-4.0, subdivision a, paragraphs 2 and 4 since both provisions extend the same privileges to both members who are injured in the line of duty and those who become disabled outside line of duty; both classifications of the membership in Article I perform the very same functions on the Light Duty Squad when unable to render full fire duties; and therefore to uphold distinctions between the two classifications contained within a single over-all provision on retirements to which each class contribute alike would be violative of the Fourteenth Amendment, Section 1 of the Constitution of the United States and Article 1, Section 11 of the New York State Constitution, both in respect to the "equal protection of the laws" and contrary to the common purpose, all of which essentially are arbitrary and capricious.

20. Furthermore, plaintiff brings this claim against the aforementioned individual defendants. The wrongful acts and omissions of said defendants herein complained of occurred and continues to occur while defendants were

and still are acting in their respective capacities as officials of the City of New York and the Fire Department Pension Fund Article I and the Board of Trustees, under color of State statutes, the Charter and Administrative Code of the City of New York, Regulations and/or customs and usages of the government of the City of New York.

WHEREFORE, plaintiff demands judgment that:

(A) the retirement of plaintiff on a non service-connected disability be declared null and void; and that he be restored to the position of Lieutenant of the Uniformed Fire Forces of the Fire Department of the City of New York until mandatory retirement age, as provided by law; he be assigned to perform "light duty" until mandatory retirement age or sooner, if the Medical Board prior thereto certifies that he could assume active fire duties;

(B) in addition to reinstatement, plaintiff be afforded the appropriate salary adjustments and wage differentials between his allotted retirement allowance and full pay, promotional opportunities, benefits, options and privileges from the time of his wrongful retirement on October 2, 1969 to the date of his reinstatement, together with interest thereon;

(C) defendants be enjoined from retiring plaintiff for either a service-related disability or non service-disability except in strict accordance with Section B19-4.0 of the Administrative Code of the City of New York;

(D) should there develop an issue of fact herein, then plaintiff be accorded a trial by jury thereon;

(E) plaintiff be granted such other and further relief as to the Court may deem proper together with interest, costs and disbursements of this action.

Howard C. Fischbach

HOWARD C. FISCHBACH
Attorney for Plaintiff
Office & P.O. Address
78-15 221 Street
Flushing, N.Y. 11364
Tel: (212) 465-4096

Verified Complaint in Montagna v. O'Hagan
(P. JA47-JA57)

STATE OF NEW YORK)
: ss.:
COUNTY OF NASSAU)

CONSTANTINE MONTAGNA, being duly sworn, deposes and says that deponent is the plaintiff in the within action; that deponent has read the foregoing complaint and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true.

Constantine Montagna

Sworn to before me this

day of April, 1975

Samuel H. Bradley

SAMUEL H. BRADLEY
NOTARY PUBLIC, State of New York
No. 30-0384500
Qualified in Nassau County
Term Expires March 30, 1977.

EXHIBITS ANNEXED TO FOREGOING COMPLAINT

EXHIBIT 1 - LETTER OF FIRE DEPARTMENT DATED NOVEMBER 25, 1968

Letter of Fire Department, dated Nov. 25, 1968

Re: Lieut. Constantine Montagna

ROBERT O. LOWERY

Pet 1

CITY OF NEW YORK
FIRE DEPARTMENT

Ist Deputy Fire Commr
Asst. Chief for Veterans
Francis J. Hartnett

MEDICAL DIVISION
278 SPRING STREET
NEW YORK, N.Y., 10013
AL gonquin 5-3226

Nov. 25, 1968.

1 1/2

TO: Robert O. Lowery, Fire Commissioner.
FROM: Gabriel P. Seley, Chief Medical Officer.
SUBJECT: Medical re-evaluation of member.

// Lieut. Constantine Montagna, LS, Farm Assignment and Planning Unit, appeared for medical re-evaluation. The minutes are as follows:

Lieut. Montagna appears for re-evaluation LS status. He was placed on limited service because of bilateral spurs of os calsis. Still has pain in heels if he is on his feet for any period of time. Condition is unchanged and it is our opinion that he be continued in Limited Service. This is non-service connected.

The committee at this examination was Medical Officers Robinson-Connell-Seley.

Respectfully submitted,
Gabriel P. Seley
Chief Medical Officer.

GPS/mc

SUPREME COURT

EXHIBIT 2 - DECISION BY FEIN, J. (NEW YORK SUPREME COURT IN SARROSICK V. LOWERY)

(Omitted here but printed at P. JA15)

ANSWER IN MONTAGNA V. O'HAGAN (Filed May 13, 1975)
(P. JA60-JA63)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

----------x

CONSTANTINE MONTAGNA,

Plaintiff,

-against-

ANSWER

(TCP)

JOHN T. O'HAGAN, as FIRE COMMISSIONER OF THE CITY OF NEW YORK and as CHAIRMAN and TREASURER OF THE FIRE DEPARTMENT PENSION FUND (ARTICLE I) and the BOARD OF TRUSTEES OF THE FIRE DEPARTMENT PENSION FUND,

75 Civ. 602

Defendants.

----------x

Defendants, by their attorney W. BERNARD RICHLAND, Corporation Counsel of the City of New York, answering the complaint herein.

1. Deny the allegations contained in paragraph "2" thereof except admit that plaintiff predicates his claim upon the provisions of Title 42 United States Code, Section 1983 and the matter is controversy, exceeds exclusive of interest and costs, the sum of ten thousand ($10,000) dollars.

2. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "3" thereof except admit that East Williston, Long Island, New York is within the jurisdiction of this Court.

3. Deny the allegations contained in paragraph "9" thereof except respectfully refer the Court to section B19-4.0(a) of the Administrative Code of the City of New York for its full content and legal effect.

4. Deny the allegations contained in paragraph "10" thereof except admit that on February 23, 1962 plaintiff was examined by the Fire Department Medical Board on his own application for ordinary disability retirement. He was found to have a partial permanent disability not caused in the performance of his duties which was diagnosed "bilateral spurs of oscalsis."The Medical Board found plaintiff unfit for fire duty and recommended plaintiff's assignment to the Light Service Squad (LSS).

5. Deny the allegations contained in paragraph "11" thereof except admit the first sentence thereof and respectfully refer the Court to plaintiff's Exhibit "1" for its full content and legal effect.

6. Deny the allegations contained in paragraph "12" thereof except admit that petitioner was retired on ordinary disability.

7. Admit the allegations contained in paragraph "13" thereof except deny that the action was properly commenced in equity.

8. Deny the allegations contained in paragraphs "14", "15", "16", "17", "18", "19" and "20" thereof.

FURTHER ANSWERING THE COMPLAINT AND AS A FIRST SEPARATE AND COMPLETE DEFENSE THERETO, DEFENDANTS ALLEGE:

9. The Court lacks jurisdiction over the subject matter of the complaint.

FOR A SECOND SEPARATE AND COMPLETE DEFENSE DEFENDANTS ALLEGE:

10. The complaint fails to state a cause of action.

FOR A THIRD SEPARATE AND
COMPLETE DEFENSE DEFENDANTS
ALLEGE:

11. The complaint is barred by res judicata and/or collateral estoppel.

FOR A FIFTH SEPARATE AND
COMPLETE DEFENSE DEFENDANTS
ALLEGE:

12. The complaint is barred by the Statute of Limitations.

FOR A SIXTH SEPARATE
AND COMPLETE DEFENSE,
DEFENDANTS ALLEGE:

13. The complaint is barred by laches.

WHEREFORE, defendants pray that this Court enter judgment dismissing the complaint with costs.

Dated: May 12, 1975

Yours, etc.,

W. BERNARD RICHLAND
Corporation Counsel
Attorney for Defendants
Municipal Building
New York, N.Y. 10007
566-2000/2192

By _____
Assistant Corporation Counsel

Answer in Montagna v. O'Hagan

VERIFICATION (P. JA60-JA63)

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

STEPHEN J. MURPHY, being duly sworn deposes and says:

I am the Acting Commissioner of the Fire Department of the City of New York in the absence of Fire Commissioner John O'Hagan, that I have read the foregoing answer and know the contents thereof to be true except as to those matters therein alleged upon information and belief and as to those matters, I believe them to be true.

STEPHEN J. MURPHY

Sworn to before me this
12 day of May, 1975

Anthony Battaglia

ANTHONY BATTAGLIA
Notary Public, State of New York
No. 30-5213600
Qualified in Nassau County
Certs. filed with Kings, Queens, Co., N. Y.
Clerk's and Register's
Commission Expires March 30, 1976

VERIFIED COMPLAINT IN SARROSICK V. LOWERY

(Omitted here but printed at P. JA24)

NOTICE OF APPEARANCE AND ANSWER IN SARROSICK V. LOWERY

- - - - - - - X

SAME TITLE

- - - - - - - X

SIR:

PLEASE TAKE NOTICE that I appear for the above named defendants in this action and for their answer herein, allege:

FIRST: Deny having sufficient knowledge or information to form a belief as to the allegations contained in the paragraph of the complaint designated "THIRD".

SECOND: Deny each and every allegation contained in the paragraphs of the complaint designated "SEVENTH", "EIGHTH" and "NINTH" except admits that the sections of law quoted therein speak for themselves.

THIRD: Deny each and every allegation contained in the paragraphs of the complaint designated "TENTH", "ELEVENTH", "TWELFTH" and "FOURTEENTH".

Dated: New York, N.Y.
December 10, 1970

Yours, etc.,

J. LEE RANKIN
Corporation Counsel
Attorney for Defendant
Office & P.O. Address
Municipal Building
Borough of Manhattan
New York, N.Y. 10007

TO:
ISRAEL & LEEDS, ESQS.
170 Broadway
New York, N.Y. 10038

[Verified by
Robert O. Lowery]

Sworn to
December 15th, 1970

ADMINISTRATIVE SEPARATION OF LIMITED PERSONNEL FROM THE FIRE DEPARTMENT

(Omitted here but printed at P. JA34)

PLAINTIFF'S STATEMENT UNDER RULE 9(g)
(Filed August 18, 1975)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - -x

CONSTANTINE MONTAGNA,

Plaintiff,

-against-

JOHN T. O'HAGAN, as FIRE COMMISSIONER OF THE CITY OF NEW YORK and as CHAIRMAN and TREASURER OF THE FIRE DEPARTMENT PENSION FUND (ARTICLE I) and the TRUSTEES of the FIRE DEPARTMENT PENSION FUND,

Defendants.

- - - - - - - - - - - - - - - - - - -x

The following are material facts as to which no triable issues exist:

Plaintiff's Exhibit "1" attached to the instant complaint is a communication on the subject of the re-evaluation of the plaintiff by the Chief Medical Officer of the Fire Department of the City of New York to the Fire Commissioner stating in substance that it is the opinion of the committee of Medical Officers referred to that the plaintiff be *** continued in Limited Service (emphasis supplied).

Plaintiff's Exhibit "2" is the decision of Justice Fein of the Supreme Court of the State of New York, County of New York, before whom the case of SARROSICK et al. -v- LOWERY et al., of which the instant plaintiff was a party. This case is

not reported but the matter was appealed to the Appellate Division, First Department and unanimously affirmed, without opinion and thereafter leave was sought to appeal to the Court of Appeals which was also denied. This decision as well as the complaint in the State court show no reference to the 14th Amendment of the United States Constitution or to Article I of the State Constitution. Examination will, however, show that Justice Fein's reference to the Constitution concerned itself to Article V, section 7 which was pleaded in the complaint and dealt with the fact that membership in the pension system of the Fire Department was a contractual right which could not be diminished or impaired. This was completely ignored by the Court for the latter made no distinction whatever as to Article I members of the Pension System. As a matter of fact, the only point raised by plaintiff was that there should be no distinctions between Article I and Article IB members who were assigned to the "light duty squad". In the instant case the equal protection of the laws clause of the 14th Amendment urges that even amongst Article I members there are distinctions. There are no Article IB members in the instant litigation.

The State Supreme Court complaint and the amended answer show the allegations of the instant answer to be specious es-

pecially when read with the transcript of the record which will be handed up as Plaintiff's Exhibit "5". Firstly, the original complaint and the amended answer merely attempt to deny certain conversations which the plaintiffs in Sarrosick claimed to have had with certain individuals in the Fire Department to remain on the light duty squad and the rights of those plaintiffs depended upon a certain quota system (Plaintiff's Exhibit "4"). Chief Muller and Lieut. Dohert, both testified at the trial in Sarrosick that the retirement of the plaintiff was due to budget certification and not to a recommendation that plaintiff was unable to perform his light duty work. The latter is the basis for plaintiff's contention of the failure to apply the laws equally amongst members of Article I and thus contrary to the United States Constitution as well as the companion State Constitutional provision. Put another way, should Administrative Code of the City of New York, section B19-4.0, subdivision a, paragraph 4 when applied to a fireman who is on the light duty squad for a non service-connected disability be treated differently than one who falls within subdivision a, paragraph 2 which applies to service-connected disability firemen who are allowed to remain without interruption until reaching mandatory

retirement age of 65 years.

The affirmative defenses of defendants of

res judicata should be dismissed because the cause of action in this Court is different from the action in the Supreme Court of the State;

this Court does not lack jurisdiction because Title 28, United States Code, Section 1343 is invoked and the claim is predicated upon the provisions of Title 42, United State Code, Section 1983, in that the plaintiff was wrongfully retired from the Fire Department in violation of his rights as a citizen of the United States, under the Constitution of the United States, particularly with respect to his rights to the Equal Protection of the Laws pursuant to the Fourteenth Amended thereto and the Constitution of the State of New York, Article I, Section 11;

the matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand ($10,000.00); Dollars;

plaintiff has exhausted all of his rights and remedies in the State Courts;

both the Statute of Limitation and Laches are dismissible because the New York State Law governs these and not the Federal Law; the 6 year statute of limitation governs which has not yet

expired since the retirement of the plaintiff, in fact, took place on October 2, 1969; laches, too, does not govern, because the statute of limitations has not expired and defendants have not shown any act or damage or delay in bringing this cause of action.

In Plaintiff's opinion, there are no issues of fact to be determined, except that there are two issues of law to be determined by the Court:

1. Are defendants "light duty" classification affecting two classes of employees who have sustained either service-related or non service-connected disabilities violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and companion New York State Constitution, when one class of employees, having sustained service-related disabilities, is permitted to remain in limited service until reaching mandatory retirement age thus preserving their full retirement benefits and allowance, while the other class of employees, similarly circumstanced, but having incurred non service-connected disabilities, is retired from service at the discretion of the Board of trustees prior to attaining maximum retirement age notwithstanding that such

a forced retirement under these circumstances adversely diminishes and impairs their full retirement privileges?

a) Has this so-called "light duty" classification, which arbitrarily distinguishes between the two classes of employees sustaining service-related and non service-connected disabilities, denied plaintiff equal protection of the laws when pursuant to Section B 19-4.0, subdivision a, paragraph 4, of the Administrative Code of the City of New York, he was assigned to "light duty" but thereafter prematurely and wrongfully retired on a non service-connected disability prior to his reaching mandatory retirement age?

2. Although plaintiff was a party-litigant in an earlier equity action concerning his wrongful retirement, are defendants not precluded from collaterally estopping him for raising the central and novel issue at bar since that issue was neither part of the pleadings nor ever litigated in the previous suit?

Dated: Queens August 15, 1975

Howard C. Fischbach
HOWARD C. FISCHBACH
Attorney for Plaintiff
78-15 221 Street
Flushing, N.Y. 11364

PLAINTIFF'S RULE 16 OF THE RULES OF CIVIL PROCEDURE

RULE 16 OF THE RULES OF CIVIL PROCEDURE (pp. JA73-JA77)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- -x

CONSTANTINE MONTAGNA,

Plaintiff,

-against-

JOHN T. O'HAGAN, as FIRE COMMISSIONER OF THE CITY OF NEW YORK, and as CHAIRMAN and TREASURER of the FIRE DEPARTMENT PENSION FUND (ARTICLE I) and the BOARD OF TRUSTEES of the FIRE DEPARTMENT PENSION FUND,

Defendants.

CIVIL ACTION
75 C 502
TCP

- -x

The attorneys for the respective parties having appeared before this Court for pre-trial conference pursuant to Rule 16 of the Federal Rules of Civil Procedure on the 20th day of June, 1975 and the said parties having advised the Court that the parties had failed to conclude a settlement of the issues or otherwise stipulate with respect to any issues of fact or law to be tried; and the Court having been advised by plaintiff's attorney that he proposed to initiate a motion for summary judgment while the Corporation Counsel, as attorney for the defendants simultaneously informed the Court that the defendants proposed to move the dismissal of the complaint; and the Court having elicited from plaintiff's attorney that in the event a trial was required, should the motions fail to be granted, said plaintiff's attorney advised the Court that he would require for the trial of the action, two witnesses from the Fire Department who had testified in the New York State Supreme Court,

New York County in Sarrosick, et al., v. Lowery et al., to wit, Chief BERNHARD MULLER and Lieut. DOHERTY, together with the plaintiff, CONSTANTINE MONTAGNA, to all of which the Corporation Counsel objected stating that her defenses particularly that of res judicata would sustain defendant's defense, and the Court having fixed August 29, 1975 in Courtroom 7 of the above Courthouse at 11:30 A.M. as the time and place for the argument of said motions,

Now, 1. plaintiff's attorney advises the Court that he has the authority from his client to enter into any and all rights to enter into stipulations which this Honorable Court may suggest respecting facts and issues in this case;

2(a) Plaintiff's attorney has prepared for submission marked pleadings for the Court;

(b) Plaintiff's attorney has a copy of claimed damages, general in nature;

(c) the basis of calculation is contained in (b) hereof;

3(a) the jurisdiction of this federal court is pursuant to Title 28, U.S. Code S 1343 in that plaintiff has exhausted his rights (Sarrosick v. Lowery) in the State Courts in a cause of action predicated on a contractual basis under the New York State Constitution, Article V, section 7 and upon certain provisions of the Administrative Code of the City of New York under which he sought reinstatement as a fire officer in the Fire Department of the City of New York. The instant action in the

federal court is on a different theory and basis in that plaintiff herein seeks to invoke the "Equal Protection of the Laws" under the Fourteenth Amendment of the United States Constitution and its companion New York State Constitution Article I, Section 11 as well as the pertinent provisions of the Administrative Code of the City of New York in order to (1) preserve and enforce his constitutional rights; (2) declare null and void his forced non-service connected disability; (3) compel reassignment to his "light" duty or "LSS" he occupied before his illegal retirement in October, 1969; (4) his back wages from the time of his illegal retirement to date, among other benefits;

(b) There are no written stipulations of uncontested facts agreed to prior to the pre-trial conference;

(c) There has been no request for admissions;

(d) In plaintiff's opinion, there are no issues of fact to be determined if a trial be required; there are, however, two (2) issues of law to be determined by the Court which, it is respectfully suggested, may be accomplished by the motion for summary judgment, thusly:

1. Are defendants "light duty" classification affecting the two classes of employees who have sustained either service-related or non service-connected disabilities violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and companion New York State Constitution,

when one class of employees, having sustained service-related disabilities, is permitted to remain in limited service until reaching mandatory retirement age thus preserving their full retirement benefits and allowance, while the other class of employees, similarly circumstanced, but having incurred non service-connected disabilities, is retired from service at the discretion of the Board of Trustees prior to attaining maximum retirement age notwithstanding that such a forced retirement under these circumstances adversely diminishes and impairs their full retirement privileges?

a) Has this so-called "light duty" classification, which arbitrarily distinguishes between the two classes of employees sustaining service-related and non service-connected disabilities, denied plaintiff equal protection of the laws when pursuant to Section B 19-4.0, subdivision a, paragraph 4 of the Administrative Code of the City of New York, he was assigned to "light duty" but thereafter prematurely and wrongfully retired on a non service-connected disability prior to his reaching mandatory retirement age?

2. Although plaintiff was a party-litigant in an earlier equity action concerning his wrongful retirement, are defendants not precluded from collaterally estopping him for raising the central and novel issue at bar since that issue was neither part of the pleadings nor ever litigated in the previous suit?

(e) The plaintiff expects to call as witnesses the plaintiff Montagna, Chief Muller of the Fire Department

Plaintiff's Rule 16 of the Rules of Civil Procedure (pp. JA73-JA77)

and Lieut. Doherty who was called as a witness by the defendants in the trial of Sarrosick v. Lowery in the New York State Supreme Court, New York County.

(f)&(g) All documents attached to plaintiff's motion papers for summary judgment have not been marked for identification but are included because they have been received in evidence in the Sarrosick case involving the instant plaintiff and the instant defendants except the defendant O'Hagen who has been substituted as successor to the former defendant, Lowery, as Fire Commissioner of the City of New York.

(h) Written statements of novel or unusual points of law, together with citations to the authorities relied thereon in support thereof have been prepared and will be handed up prior to the argument of the motion for summary judgment motion.

Dated: Queens, New York
August 15, 1975

Howard C. Fischbach

HOWARD C. FISCHBACH
Attorney for Plaintiff
78-15 221st Street
Flushing, New York
(212) 465-4096

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CONSTANTINE MONTAGNA,

Plaintiff,

-against-

JOHN T. O'HAGAN, as FIRE COMMISSIONER OF THE CITY OF NEW YORK and as CHAIRMAN and TREASURER OF THE FIRE DEPARTMENT PENSION FUND (ARTICLE I) and the BOARD OF TRUSTEES OF THE FIRE DEPARTMENT PENSION FUND,

Defendants.

NOTICE OF MOTION FOR SUMMARY JUDGMENT

75 Civ. 602 (TCP)

S I R :

PLEASE TAKE NOTICE that upon the annexed defendants' statement of material facts, pursuant to Rule 9(g) of the rules of this Court and the exhibits annexed, the memorandum of law submitted in support of the defendants' motion for summary judgment and upon all other papers and proceedings had herein, the undersigned will move this Court at a motion part thereof before the Honorable Thomas C. Platt, United States District Judge, at the United States Courthouse, 225 Cadman Plaza, Brooklyn, New York, on the 29th day of August, 1975, at 11:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for a summary judgment in favor of the defendants and against the plaintiff pursuant to Rule 56(b) of the Federal Rules of Civil Procedure on the grounds that the complaint is barred by the statute of limitations and by res judicata and/or collateral estoppel and for such other and further relief as to this court may seem just and proper.

Yours, etc.

W. BERNARD RICHLAND
Corporation Counsel
Attorney for Defendants
Municipal Building
New York, New York 10007

Defendants' Motion for Summary Judgment

Dated: August 13, 1975

By: _____
MARIAN PROBST
Assistant Corporation Counsel
566-2500/2192

TO: Clerk of the Court

Howard C. Fischbach
Attorney for Plaintiff
78-15 221st Street
Flushing, New York 11364
465-4096

DEFENDANTS' STATEMENT UNDER RULE 9(g)

(pp. JA80-JA83)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CONSTANTINE MONTAGNA, Plaintiff, -against-	:	75 Civ. 602 (TPG)
JOHN T. O'HAGAN, as FIRE COMMISSIONER OF THE CITY OF NEW YORK and as CHAIRMAN and TREASURER OF THE FIRE DEPARTMENT PENSION FUND (ARTICLE I) and the BOARD OF TRUSTEES OF THE FIRE DEPARTMENT PENSION FUND, Defendants.	:	RULE 9(g) STATEMENT, MATERIAL FACTS AS TO WHICH DEFENDANTS CONTEND THERE IS NO GENUINE ISSUE TO BE TRIED

Pursuant to Rule 9(g) of the General Rules of this Court, defendants having moved for summary judgment on two grounds submit this statement of material facts as to which defendants contend there is no genuine issue to be tried, in support thereof.

A. The first ground of defendants' motion is that this action brought pursuant to 42 USC 1983 and its jurisdictional predicate, 28 USC 1343 is barred by the statute of limitations, the applicable statute of limitations is a federal civil rights case brought in New York being the three years provided by New York Law for liability based on a statute CPLR 214(a). With respect to that ground, defendants allege the following facts are not in dispute:

1. Plaintiff alleges in paragraph 2 of the complaint that his claim is predicated upon the provisions of Title 42 United States Code, Section 1983 is that he was wrongfully retired from his employment as Lieutenant in the Uniformed Fire Forces of the Fire Department of the City of New York.

2. Plaintiff was retired on ordinary disability on October 2, 1969 on the application of the Fire Commissioner.

3. This action was instituted by filing of the complaint on or about April 22, 1975.

4. The second ground for the defendants' motion is that the complaint is barred by res judicata and collateral estoppel. With respect to this ground, defendant alleges the following facts are not in dispute:

1. On or about November 16, 1970, Constantine Montagna, the plaintiff in this action, commenced an action, among other plaintiffs, in the New York State Supreme Court. A copy of the complaint in said action is annexed hereto as Exhibit "A".

2. The title of said action was

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

RAYMOND S. SARROSKICK, CONSTANTINE MONTAGNA, TIMOTHY A. O'CONNOR, LOUIS SHAENER, PETER S. BEKISZ, EDWARD T. MALONE, ROBERT M. REILLY and JAMES J. BURNS,

Plaintiffs,

-against-

ROBERT O. LOWERY, as Fire Commissioner of the City of New York, and as Chairman and Treasurer of the Fire Department Pension Fund (Article I) and Chairman of the Fire Department Pension Fund (Article I-B) and the Board of Trustees of the Fire Department Pension Funds,

Defendants.

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3. The action was litigated under New York County Index No. 6376/1971.

4. By memorandum decision rendered after trial by Justice Arnold Fein, dated March 30, 1973 a copy of which is annexed hereto as Exhibit "B", Justice Fein granted defendants' judgment dismissing the complaint.

5. Judgment of the Supreme Court, New York County, Fein, J., was entered on April 18, 1973 dismissing the complaint.

6. Plaintiffs appealed to the Appellate Division of the Supreme Court of the State of New York, First Department, from the aforesaid judgment and from an intermediate order (Riccobano, J.) entered June 23, 1972 denying plaintiffs' motion for summary judgment. A copy of the Notice of Appeal is annexed hereto as Exhibit "C".

7. In connection with said appeal, the plaintiffs filed and submitted a brief entitled "Appellant's Brief". A copy of the Appellant's Brief is annexed hereto as Exhibit "D".

8. The Appellant's Brief, at page 8 thereof, under the heading "Statutes Involved", cited New York State Constitution, Article I, Section II.

9. The Appellant's Brief, at pages 19, 23, 24 and 25 contains an equal protection argument.

10. The Respondent's Brief, at pages 18 and 19 responds to the equal protection argument contained in Appellant's Brief.

11. An Order of the Appellate Division, First Department, entered January 17, 1974, unanimously affirmed without opinion, the judgment and intermediate order appealed from. A copy of said order is annexed hereto as Exhibit "E".

Exhibit - Defendants' Statement Under Rule 9(g)
(pp. JA80-JA83)

12. Plaintiffs thereafter sought leave to appeal to the Court of Appeals from the order of the Appellate Division, which motion was denied. (34 NY 2d 514).

Dated: August 13, 1975

Respectfully submitted,

W. BERNARD RICHLAND
Corporation Counsel
City of New York
Attorney for Defendants
Municipal Building
New York, New York 10007
566-2500/2192

By: Marian Probst
MARIAN PROBST
Assistant Corporation Counsel

EXHIBITS ANNEXED TO FOREGOING DEFENDANTS' MOTION

EXHIBIT A - VERIFIED COMPLAINT IN SARROSICK V. LOWERY

(Omitted here but printed at p. JA64)

EXHIBIT B - DECISION BY FEIN, J. (N.Y. SUPREME COURT IN SARROSICK V. LOWERY

(Omitted here but printed at p. JA15)

EXHIBIT C - NOTICE OF APPEAL TO APPELLATE DIVISION
IN SARROSICK v. LOWERY

NOTICE OF APPEAL

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

RAYMOND S. SARROSICK, CONSTANTINE MONTAGNA, TIMOTHY A. O'CONNOR, LOUIS SHAEMER, PETER B. BEKISZ, EDWARD T. MALONE, ROBERT M. REILLY and JAMES J. BURNS,

Plaintiffs,

-against-

ROBERT O. LOWERY, as FIRE COMMISSIONER OF THE CITY OF NEW YORK, and as CHAIRMAN and TREASURER of the FIRE DEPARTMENT PENSION FUND (ARTICLE I and CHAIRMAN of the FIRE DEPARTMENT PENSION FUND (ARTICLE IB) and the BOARD OF TRUSTEES of the FIRE DEPARTMENT PENSION FUNDS,

Defendants.

----------X

SIRS:

PLEASE TAKE NOTICE that the above named plaintiffs hereby appeal to the Appellate Division of the New York Supreme Court in and for the First Department from all intermediate orders and from a judgment entered in the above entitled action dismissing the complaint in favor of the defendants against the above named plaintiffs, entered in the Office of the Clerk of the County of New York on the 9th day of April, 1973, and this appeal is taken from each and every part of said orders and of said judgment as well as from the whole thereof.

Dated: New York, April 30, 1973.

Yours, etc.,

ISRAEL & LEKUS
Attorneys for Plaintiffs
* * *

TO: NORMAN REDLICH, ESQ.
Corporation Counsel
Attorney for Defts.
* * *

EXHIBIT D - APPELLANTS' APPELLATE DIVISION BRIEF IN SARROSICK v. LOWERY IN SUPPORT OF DEFENDANTS' MOTION (Pp. JA87-125)

To be argued by:
Howard C. Fischbach

6/1/22

New York County Clerk's Index No. 6376/70

Supreme Court

OF THE STATE OF NEW YORK

APPELLATE DIVISION – FIRST DEPARTMENT

RAYMOND S. SARROSICK, CONSTANTINE MONTAGNA, TIMOTHY A. O'CONNOR, LOUIS SHAENER, PETER S. BEKISZ, EDWARD T. MALONE, ROBERT M. REILLY and JAMES J. BURNS,

Plaintiffs-Appellants,

-against-

ROBERT O. LOWERY, as FIRE COMMISSIONER OF THE CITY OF NEW YORK, and as CHAIRMAN and TREASURER of the FIRE DEPARTMENT PENSION FUND (ARTICLE I) and CHAIRMAN of the FIRE DEPARTMENT PENSION FUND (ARTICLE IB) and the BOARD OF TRUSTEES of the FIRE DEPARTMENT PENSION FUNDS,

Defendants-Respondents.

APPELLANTS' BRIEF

ISRAEL & LEE
Attorneys for Plaintiff-Appellants
170 Broadway
New York, New York
964-0919

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION - FIRST DEPARTMENT

- X

RAYMOND S. SARROSICK, CONSTANTINE MONTAGNA, TIMOTHY A. O'CONNOR, LOUIS SHAENER, PETER S. BEKISZ, EDWARD T. MALONE, ROBERT M. REILLY and JAMES J. BURNS,

Plaintiffs-Appellants,

-against-

ROBERT O. LOWERY, as FIRE COMMISSIONER OF THE CITY OF NEW YORK, and as CHAIRMAN and TREASURER of the FIRE DEPARTMENT PENSION FUND (ARTICLE I) and CHAIRMAN of the FIRE DEPARTMENT PENSION FUND (ARTICLE IB) and the BOARD OF TRUSTEES of the FIRE DEPARTMENT PENSION FUNDS,

Defendants-Respondents.

- X

PLAINTIFFS-APPELLANTS' BRIEF

ISSUES PRESENTED

1. Were plaintiffs' contractual rights, conferred upon them by the Administrative Code Pension Fund provisions and guaranteed by the State Constitution, not breached, diminished or impaired by the illegal and improper actions of defendants?

The Court below ignored this basic general issue.

2. Do State Constitution Article 5, Section 7 and Administrative Code, Sections B 19-4.0 and B 19-7.83, applicable respectively to Article I and IB membership in the Pension Fund, not confer such contractual rights upon

plaintiffs which jurisdictionally could be enforced in equity?

The Court below expressing doubt upon this issue, nevertheless, assumed jurisdiction only because of defendants' failure to object thereto.

(a) Were plaintiffs Montagna and Malone, in the absence of positive certifications by the Medical Board that each of them was unable to continue performance of his assigned ''light duty'' on the LS Squad, not illegally retired as members of Article I (Section B 19-4.0).

The Court below ignored this issue.

(b) Under the circumstances and the evidence of this case, were plaintiffs Montagna and Malone not illegally retired by the Fire Commissioner by reason of their medical re-evaluation findings that each of their physical conditions remained unchanged and thus merited continuance on the LS Squad to continue performance of ''light duty'' which it recommended.

The Court below ignored this issue.

(c) Were all other plaintiffs, except Reilly, as Article IB members, not illegally retired by failure of the Medical Board to make positive certification in each case of inability to continue performance of ''light duty'' but, instead, made extraneous findings that each may engage in a ''*** suitable sedentary occupation ***.''

The Court below answered no.

(d) Was plaintiff Reilly coercised into his acceptance of the Fire Department's prior stated condition and promise to promote him to Battalion Chief if he would submit his early retirement papers and was he thus not illegally retired on a non-service connected disability.

The Court below ignored this issue.

(e) Did acceptance and continued performance of ''light duty'' on the LS Squad by all plaintiffs, except Railly, prior to their retirements, not estop defendants from subsequently considering whether the ''right'' to ''light duty'' was justified.

The Court below answered No.

(f) Was not the evidence overwhelmingly in plaintiffs' favor that promises were made by the Fire Commissioner, through his subordinates, to extend and/or retain plaintiffs' services of ''light duty'' until each reached mandatory retirement age of 65 years.

The Court below answered No.

(g) Do not the words ''subject to the rules governing such force, ***'' as they appear in Section B 19-4.0, sub-paragraph 4, in relation to assignments of ''light duty'' to Article I membership and as implied and applied to IB membership, exclude the quota system established and utilized by the Fire Commissioner to replace incumbents already serving on the LS Squad who were never certified, as required by law, as unfit to continue their performance of ''light duty''.

The Court below answered No.

NATURE OF THE ACTION AND FACTS

From the commencement of their employment in the New York City Fire Department to the dates of their respective retirements on so-called non-service connected disabilities, plaintiffs were members of either Article I or Article IB of the Fire Department Pension Funds.

Through civil service promotional examinations, most of them attained superior ranks from Lieutenant to Battalion Chief with total service ranging between 16

and 31 years.

Although the theory of this case raises no question of a review whether plaintiffs' disabilities were incurred in the line of duty or otherwise, the germane facts show that all plaintiffs were offered ''light duty'' subject to the terms and conditions contained in the appropriate Administrative Code provisions, more fully discussed in our Point II, pp. 8, 9, infra. Plaintiffs accepted their assignments of ''light duty'' at various times and scrupulously then refrained from filing applications for service-connected disabilities because of their collective desire to remain in service and assert their Fire Department membership rights preserved to them under the Administrative Code and guaranteed by the New York State Constitution.

Instead, after satisfactorily performing ''light duty'' for which each of them was commended and duly certified from time to time by the Fire Department Medical Board as fit to continue to render ''light duty'' work, sedentary in character, plaintiffs were thereafter illegally retired on non-service connected disabilities although each of them was willing, able and entitled, by law, to continue performance of ''light duty'' theretofore guaranteed them.

Even without pursuing so-called questions of fact allegedly raised by defendants' specious denials, it is

plaintiffs' contention, nevertheless, that in the absence of a specific positive finding or certification by the Medical Board that each plaintiff was unfit to thereafter perform ''light duty'', to which he had previously been duly assigned, he thereby was entitled, as a matter of vested right to remain in that status and not be compelled to retire. Put another way, the applicable Administrative Code provisions on retirement may not be used to compel retirement of a member of the Fire Department Pension Fund so long as he remains fit to perform his ''light duty'' and until he reaches mandatory retirement age of 65 years.

THE OPINIONS

1. Before trial of this equity action, plaintiffs moved for summary judgment under Rule 3212 (b) and judgment on the pleadings under Rule 3211 (b). The Court (Riccobono, J.) [p. A7-a] having failed to dispose of both branches of the motion, by letter application seeking reargument, recalled his memorandum decision of May 11, 1972 and substituted in its place a memorandum decision which denied (a) summary judgment on finding that issues of fact were presented requiring a plenary trial, and (b) judgment on the pleadings without prejudice to a renewal thereof because that branch of the motion was premature after permitting amendment of defendants' answer.

2. After trial, the Court below (Stein, J.) [p. A94-a-A102-a] found the following:

(a) The relief sought required a Review available only in an Article 78 proceeding despite the fact that plaintiffs' counsel urged that their case was one in equity for specific performance of Constitutional Contractual rights. The justice waived aside this jurisdictional question on the ground only that defendants had failed to raise any issue in that regard;

(b) although the evidence supported a conclusion that each plaintiff became disabled by appropriate determinations of the Medical Board, these, nevertheless, were non-service connected;

(c) the evidence "hardly supported" a conclusion that contracts were made, as urged by plaintiffs, by which "light duty" performed by plaintiffs was extended for promises by the Fire Department to keep plaintiffs on that assignment if they would accept non-service connected retirements until mandatory retirement age of 65 years or, sooner, if found unfit by the Medical Board to perform those tasks;

(d) doubt existed that officials of the Fire Department could bind defendants to such contracts, but if they could be so bound, then plaintiffs were not entitled to the relief sought, even assuming that representations and promises were made;

(e) the Medical Board acted properly on plaintiffs' retirements upon the Fire Commissioner's applications,

though the Medical Board in each instance found plaintiffs capable of engaging ''in a suitable sedentary occupation'' and despite plaintiffs contention otherwise that each of them was thereby qualified for continuance in his light duties;

(f) in referring to Section B19-7.84 as inapplicable but that, instead, Section B-7.83 was the correct section, the Court dwelt on that fact despite plaintiffs' obvious intention to rely on the latter section; in any event, holding plaintiffs were not entitled to their relief in view of defendants retiring them for non-service connected disabilities even when the Medical Board used the words ''may engage in a suitable sedentary occupation,'' those words did not denote a recommendation that plaintiffs be allowed to perform ''light duty'' on continued LS Squad status;

(g) the case of Breen v. Fire Department's Pension Fund, 299 N.Y.8, cited by plaintiffs was mispent because the Court of Appeals was there construing Administrative Code section B19-4.0, subdivision (a). paragraph 2, applicable to service-connected disabilities rather than to non-service disabilities in this case;

(h) equally misplaced was Cunningham v. Hayes, Misc. 531, in that the issue there, too, was whether the disability was service connected (the issue, in fact, here was as in the instant case one of non-service connected disability);

(i) there was no right to light duty since there was no issue whether the disability was or was not service connected and, furthermore, that retirement on ordinary disability was appropriate because there was no finding of qualification for light duty. (emphasis supplied)

STATUTES INVOLVED

NEW YORK STATE CONSTITUTION

"Article 1, Section 11. [Equal protection of laws;***] No person shall be denied the equal protection of the laws of the state or any subdivision thereof.******"

* * * *

"Article 5, Section 7. [Membership in retirement systems; benefits not to be diminished nor impaired.]
After July first, nineteen hundred forty, membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired. Adopted by Constitutional Convention of 1938; approved by the people Nov. 8, 1938."

* * * *

ADMINISTRATIVE CODE OF THE CITY OF NEW YORK

"Section B19-4.0 Payment of pensions; disability; retirement for service. - a. The board of trustees shall retire any member who, upon an examination, as provided in subdivision d of this section, may be found to be disqualified, physically or mentally, for the performance of his duties. Such member so retired shall receive from such pension fund an annual allowance or pension as provided in this section. In every case such board shall determine the circumstances thereof, and such pension or allowance so allowed is

to be in lieu of any salary received by such member at the time of his being so retired. The department shall not be liable for the payment of any claim or demand for services thereafter rendered, and the amount of such pension or allowance shall be determined upon the following conditions:

1. In case of total permanent disability at any time caused in or induced by the actual performance of the duties of his position, the amount of annual pension to be allowed shall not be less than three-fourths of the annual compensation allowed such member as salary at the date of his retirement.

2. In case of partial permanent disability at any time caused in or induced by the actual performance of the duties of his position, which disqualifies him only from performing active duty in the uniformed force, the member so disabled shall be relieved by the commissioner from active service at fires and assigned to the performance of such light duties as a medical officer of such department may certify him to be qualified to perform, or he shall be retired on his own application at not less than three-fourths of his salary at the date of his retirement from the service, on an examination, as provided by subdivision d of this section, showing that his disability is permanent.

3. In case of total permanent disability not caused in or induced by the actual performance of the duties of his position, which shall occur after the expiration of ten years' service in such department, the amount of annual pension to be allowed shall be one-half of the annual compensation allowed such member at the date of his retirement from the service.

4. In case of partial permanent disability not caused in or induced by the actual performance of the duties of his position, which may occur after ten years' service in such department, the member so disabled may be relieved by the commissioner from active service at fires, but shall remain a member of the uniformed force, subject to the rules governing such force, and be assigned to the performance of such light duties as a medical officer of such department may

certify him to be qualified to perform, or, if such member be retired after the expiration of ten years' service the annual allowance to be paid to such member shall be one-half of the annual compensation allowed such member at the date of his retirement from the service.

5. In case of total permanent disability not caused in or induced by the actual performance of the duties of his position, which may occur before the expiration of ten years' service in such department, the amount of annual pension to be allowed shall be one-third of the annual compensation allowed such member at the date of his retirement from the service.

6. In the case of partial permanent disability not caused in or induced by the actual performance of the duties of his position, which may occur before ten years' service in such department, the member so disabled shall be relieved by the commissioner from active service at fires, but shall remain a member of the uniformed force, subject to the rules governing such force, and be assigned to the performance of such light duties as a medical officer of such department may certify him to be qualified to perform, or, if such member be retired before the expiration of ten years' service, the annual allowance to be paid to such member, shall be one-third of the annual compensation allowed such member at the date of his retirement from the service."

****

"Section B19-7.83 Retirement; for ordinary disability. - Medical examination of a member in city-service for ordinary disability shall be made upon the application of the commissioner, or upon the application of such member or of a person acting in his behalf, stating that such member is physically or mentally incapacitated for the performance of duty and ought to be retired. If such medical examination shows that such member is physically or mentally incapacitated for the performance of duty and ought to be retired, the medical board shall so report and the board shall retire such member for ordinary disability not less than thirty nor more than ninety days after the execution and filing of application therefor with the pension fund. (As added by L.L. 1941, No. 52, August 29.)"

* * * *

"Section 487a-19.0 Termination of service of members of uniformed force because of superannuation. -a. No member of the uniformed force of the fire department except medical officers, who is or hereafter attains the age of 65 years shall continue to serve as a member of such force but shall be retired and placed on the pension rolls of the department, provided however, that any member who is not eligible for retirement at age 65, shall continue to serve as a member only until such time as he becomes eligible for such pension retirement:

* * * *

NEW YORK CITY CHARTER

CHAPTER 19
FIRE DEPARTMENT

"Section 481. Department Commissioner - There shall be a fire department the head of which shall be the Commissioner."

"Section 487. - a. The Commissioner shall have sole and exclusive power and perform all duties for the government, discipline, management maintenance and direction of the fire department and the premises and property in the custody thereof. (emphasis supplied).

POINT I

UNDER THE CONSTITUTION OF THE STATE OF NEW YORK, PLAINTIFFS' MEMBERSHIP IN THE FIRE DEPARTMENT PENSION FUNDS AS ESTABLISHED BY THE ADMINISTRATIVE CODE OF THE CITY OF NEW YORK, MANDATES A CONTRACTUAL RELATIONSHIP, THE RIGHTS OF WHICH MAY NOT BE BREACHED, DIMINISHED OR IMPAIRED AND WHICH RIGHTS THE COURTS MAY ENFORCE IN EQUITY.

(a)

Although defendants failed to raise the issue whether plaintiffs rights were enforceable in equity for specific performance, the Court below, nevertheless, made the gratuitous observation that no cases "have been found and none have been cited to the court granting the kind of relief sought in an equity action." (p. A95-a)

We repeatedly stated that plaintiffs were not seeking review of their retirements. Thus, the Court below erred in ignoring our citations of Underhill v. Valentine, 267 App. Div. 778 (1943) and, City of Buffalo v. International Railway Co., 135 Misc. 504, aff'd, 232 App. Div. 868 (1930) to support our contention of equitable enforcement as proper in this action.

Article 5, Section 7 of the Constitution of the State of New York provides:

> "After July 1, 1940, membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired." (Emphasis added)

It is so well settled as to require no elaborate citation that the pertinent constitutional provision specifically provides that the relationship between the appropriate parties is a contractual one. Birnbaum v. New York State Teachers' Retirement System, 5 N.Y. 2d 1, rev'd, 3 A.D. 2d 815, 176 N.Y.S. 2d 984 (1958); and Carroll v. Grumet, 281 App. Div. 35, 117 N.Y.S. 2d 553 (1952). Furthermore, the rights and duties of plaintiffs are fully set forth in Sections B19-4.0 (p. 8, 9) and B19-7.83 (p. 10) of the Administrative Code of the City of New York.

The contract relationship here is based upon constitutional and statutory provisions, and thus there exists no obstacle to its enforcement by a court of equity in an action for specific performance. Underhill v. Valentine, 267 App. Div. 778 (1943); and, City of Buffalo v. International Railway Co., 135 Misc. 504, aff'd, 232 A.D. 868 (1930).

Our cited cases uniformly hold that a contract must possess certain elements for a court of equity to exercise jurisdiction to compel its performance; it must be upon a valuable consideration; it must be reasonably certain as to its subject matter, its stipulations, its purposes, its parties and the circumstances under which it was made. Stokes v. Stokes, 148 N.Y. 708 (1896);

Winne v. Winne, 166 N.Y. 263, 273 (1901); and, Mahaney v. Carr, 175 N.Y. 454, 461 (1903).

The provisions of the Administrative Code, pp. 8-10, supra, set forth, in effect, a unilateral contract, subject only to one express condition, that is, the performance of "light duty" by those entitled to its benefits. That condition having been fulfilled, the pertinent provisions were thereby converted into a bilateral contract, capable of specific performance. Cochran v. Taylor, 273 N.Y. 172, 183 (1937).

The contractual relationship alleged in the complaint contains all of the foregoing elements which are pleaded in paragraphs thereof numbered "Eighth" through "Fifteenth" of the Complaint and clearly establish the relief sought by plaintiffs. (pp. A34-a-A41-a).

It is crystal clear that the purpose of this action was not to enforce the performance of a public official duty, but rather to enforce the performance of a contractual right.

POINT II

AS A MATTER OF LAW, PLAINTIFFS ASSIGNMENTS TO "LIGHT DUTY" UNDER EITHER ARTICLE I OR ARTICLE IB OF THE PENSION FUNDS VESTED THEM WITH CONSTITUTIONAL CONTRACTUAL RIGHTS WHICH THE DEFENDANTS COULD NOT BREACH, DIMINISH OR IMPAIR WITHOUT CONTRAVENING THE STATE CONSTITUTION AND THE ADMINISTRATION CODE.

Assuming, arguendo, that no question of fact

was here raised as to promises by defendants to assign "light duty" for acceptance by plaintiffs of non-service connected disability retirements, we maintain, nevertheless, as a matter of law, that plaintiffs, by membership in either Article I or IB, were ertitled to continued status on the LS Squad in the clear absence of positive certifications of their inability to perform light duty. Although we respectfully urge this Court to accept and make no distinction between the rights of members in either category, because of the actual extensions to each group of light duty as the evidence discloses, we shall, however, here deal separately with all plaintiffs irrespective of whether they were covered by Article I and Article IB.

(a)

Plaintiffs Montagna and Malone

The testimony of Montagna (pp. A127-A160), in capsule form, showed him to be 59 years old, appointed to the Fire Force on January 1, 1938 from which he was separated on October 2, 1969 by retirement on a non-service connected disability; that he was a member of Article I of the Pension Fund and thereafter on February 23, 1962, was designated for light duty on the LS Squad; that he continued this service until the date of his so-called retirement; that he was initially recommended for LS duty by medical officer, Dr. Gabrilove upon assurance that he was not

being rushed to retirement.

The most significant revelation of the circumstances of Montagna's irregular retirement came from Lt. Doherty, a witness for defendants. He testified (pp. A193-195) that it was the Chief in Charge of the Bureau of Personnel and Administration who received his orders from the Fire Commissioner; that in each and every instance LSS assignments are approved by the Fire Commissioner; the Fire Commissioner did not appear to rebut any part of Montagna's testimony nor of any other witness. For that matter no Commissioner appeared to offer any light in the dispute and testimony involving any plaintiff.

Doherty produced a letter dated November 25, 1968 among others, which was marked Defendants' Exhibit D in evidence (p. A-274). This letter ordered Montagna to be processed for retirement despite the fact that it specifically stated that Montagna's physical condition "is unchanged and it is our opinion that he be continued in Limited Service". (emphasis supplied) This certainly was no positive certification that Montagna was unable to perform light duty. On the contrary, it was a finding by the Medical Board which should have compelled the Fire Commissioner to retain Montagna's services at the time and thereafter until his physical condition, in the sole judgment of the Medical Board, would find him no longer able to perform light service.

The precise situation prevailed with respect to plaintiff Malone. He, too, was covered by a similar letter dated Nov. 25, 1968. The Record (pp. A-173-174) showed that by stipulation between the parties, if called upon to testify Malone would say that his age was 55 years, that he was appointed a fireman on November 1, 1938, under Article I, and that he was on Medical leave from March, 1964, that he then had a conversation with Deputy Chief Schneibel of the Medical Division who recommended that he (Malone) abstain from filing a service-connected disability retirement application in return for which he would be given duty on the Limited Service Squad; that he accepted such assignment and was wrongfully and allegedly retired on October 4, 1969 as a Lieutenant.

It is obvious that these Article I plaintiffs performed their light duties and were certified as fit to continue their assignments until defendant Fire Commissioner illegally forced their retirements without regard to the constitutional mandate and the provisions of the Administrative Code. This action completely ignored the Medical Board's certification that each plaintiff was again able to continue performance of LS duties or of character of work sedentary in nature as the cases hold.

The specific question is one of first impression insofar as it concerns the application of pertinent constitutional and statutory provisions to a situation such as

exists in the case at bar where an employee having sustained a partial non-service connected disability, rather than one which affects service-connected disability cases, is medically certified for ''light duty'', and is assigned and subsequently performs such limited duty only to be summarily retired thereafter.

In Matter of Breen v. N.Y. Fire Dept. Pension Fund, 299 N.Y. 8, rev'd 273 App. Div. 689 (1949), the petitioner there, a Battalion Chief, had been certified as having sustained, in the actual performance of duty, a partial permanent disability and was assigned light duty pursuant to Section B19-[illegible]0, subdivision a, paragraph 2 of the Administrative Code. He performed his assigned light duty and continued such performance until he was involuntarily retired by the Fire Commissioner under subdivision b of said Section. The issue before the Court involved the petitioner's right to continue on light duty until mandatory retirement age, or, unless found unfit by the Medical Board to do so. Special Term supported the petitioner's contention. On appeal, the Appellate Division, by a divided vote, reversed Special Term. On further appeal to the Court of Appeals, that Court reversed the Appellate Division and upheld petitioner's right to continue his light duty as the medical officer of the Fire Department had failed to specifically certify him as unfit to perform light duty and thus could not be terminated by compulsory retirement.

Significantly, the theory supporting petitioner's rights in Breen was clearly enunciated by Presiding Justice Peck's Appellate Division dissenting opinion and unanimously thereafter adopted by the Court of Appeals:

> "There being no finding that petitioner is unfit for the light duty which he was placed under paragraph 2 of subdivision a, I am of the opinion that he is entitled to maintain his status under that subdivision and may not be retired under subdivision b. In other words, subdivision b does not require the retirement thereunder of a member of the department who has been placed on light duty under subdivision a, so long as he is fit for that duty, merely because he has performed twenty years' service. If subdivision b had that effect it might produce the incongruous result of forcing a retirement on less favorable terms (half pay) than the member is entitled to by voluntary retirement (three quarters pay) under subdivision a. While petitioner has been granted three-quarters pay, that seems to be a matter of grace rather than right, and in construing the statute we should consider rights." 273 App. Div. 689, supra, at p. 695. (Emphasis added)

Although Breen is perhaps distinguishable from the case at bar on the grounds that (1) petitioner sustained a service connected injury whereas here plaintiffs' injuries were allegedly non-service connected, and (2) the Courts there were asked to construe Section B19-4.0, subdivision a, paragraph 2 of the Administrative Code while here this Court is asked to construe Section B19-4.0, subdivision a, paragraph 4 in the same light. We respectfully urge this Court to hold that, in law, no real basis warranting distinctions between the provisions of B19.4.0 really is justified where all members of the Pension Funds, who

received ''light duty'', are and should be entitled to the same ultimate disposition on the theory of equal protection of the laws.

(b)

As to all other plaintiffs in Article IB, except Reilly, concerning each of whom we shall deal separately in our following subparagraphs:

Plaintiff Sarrosick testified, on direct examination, at length (pp. A10-A36) and (pp. A38-A41), by concession of defendants that he was a Lieutenant on the Fire Force, and was an Article IB member and was initially assigned to the LS Squad on February 26, 1966; that he had a conversation with Chief Love between March 15 and March 24, 1965 who assured him that if he did productive work and was able to do light work ''there would be no worry about being forced out of the Fire Department; (p. A21) that he was removed from the LS Squad by his compulsory retirement on Oct. 2, 1969 after a medical board made its finding that he ''may engage in a suitable sedentary occupation.'' Sarrosick's testimony was not disputed.

Plaintiff Bekisz on direct examination (pp. A160-A171) testified that he was appointed a Fireman on April 1, 1947 and was retired with the rank of Lieutenant on Oct. 2, 1969. After some confusion regarding his first medical examination on his alleged disability, he

corrected his testimony to show that he was physically examined in September of 1967 when he was placed on the LS Squad, and that he was assured of continuance of LS duties thereafter as long as he could render satisfactory services. Bekisz was not cross-examined.

Plaintiffs Shaener and Burns - The defendants agreed to stipulate for the sake of economy of the Record with respect to these plaintiffs. (pp. A174-175). It was agreed that if Shaener were called to testify, he would say that he was appointed a Fireman on July 1, 1940, that he became a member of IB of the Pension Fund; he would further testify that shortly prior to July 18, 1956, after examination by a panel of three doctors, one of them told him he would be put on the LS Squad if he did not apply for retirement; also that Chief Hartnett at about the same time said to him "not to worry. It is not the policy to hurt anybody and as long as you do your job, you will have a permanent job." He was also told the same thing by a Capt. O'Brien, his supervisor. He was, however, compelled to retire on July 14, 1970.

Plaintiff Burns - Stipulation was made as to him (pp. A175-A176), that he was a member of Article IB, having been appointed a Fireman on June 1, 1954; that he was recommended for the LS Squad on March 17, 1965 after an examination by a 3 man Medical Board; that he had a conversation with Chief Schneibel who told him that he

would remain on the LS Squad until he voluntarily retired.

Plaintiff Reilly testified at length (pp. A99-A121) on direct examination to the effect that he became a Fireman in September, 1941 and was retired on October 2, 1969 as a IP member, that he did not voluntarily retire and went to see Chief Schneibel, the Deputy chief in charge of the Medical Division about being recommended for limited service. He said he did so because, at the time, he was a Captain awaiting promotion to the rank of Battalion Chief. Chief Schneibel told him to stick it out and stay in the Department so that, if the heart bill came through the Legislature, he would be eligible to retire to his advantage under the terms of such a bill and, therefore, he did not fight the proposed non-service connected disability. He further testified that he received a Fire Department letter, dated March 1, 1968, ultimately received in evidence as Plaintiffs' Exhibit 4. This letter (p. A-258) stated that, pending LSS because of inability to perform full duty, pursuant to directive of Fire Commissioner Scott, may be promoted to the rank of Battalion Chief provided he immediately submitted an application for retirement; that he ultimately submitted his application for retirement on April 21, 1969 accepting the conditional promotion (p. A-260) Plaintiffs' Exhibits 5 and 6 (p. A-263) and Plaintiffs' Exhibit 7 (p. A-264) which was a communication from Fire Commissioner Lowery directing his appearance for Medical examination.

Although all plaintiffs, as members of Article 1B, were allegedly retired pursuant to Section B19-7.83, we contend that they, too, were similarly entitled to the same positive certifications by the Medical Board as would members of Article I under the Breen and Cunningham cases, infra, in respect to continuance on the LS Squad in their light duty assignments absent findings that they were unfit to perform such tasks.

Irrespective of any possible Breen distinctions, it is doubtful whether the Court of Appeals ruling would have been decided differently had the issue there been similar to the one presented before this Court. We respectfully maintain that the Court of Appeals would have interpreted and applied Section B19-4.0, subdivision a, paragraph 4 together with Section B19-7.83 no differently than it construed subdivision a, paragraph 2 thereunder where the assignment of light duty had been medically certified and performed by the employee regardless of the nature of his injury.

Whether an employee has sustained a service or non-service connected injury, he has, as a member of his pertinent retirement system, specific constitutional rights extending to situations where a certification of light duty has been granted and performed. Protecting only those who sustained a service related disability and deprive others falling into a non-service category, whenever the question

of light duty arises, would be contrary to the constitutional rights guaranteed employees suffering from either type of disability. To do otherwise would establish classifications favoring one over the other, thus denying the employee with a non-service connected injury of the equal protection of the laws under Article 1, Section 11 of the State Constitution. The essence of this constitutional right to "equal protection of the laws" is that all persons similarly situated, e.g. those actually assigned rather than the right to be assigned to perform light duty work, must be treated alike. Myer v. Myer, 271 App. Div. 465, 66 N.Y.S. 2d 83, motion denied 271 App. Div. 823, 66 N.Y.S. 2d 618, appeal granted 271 App. Div. 869, 66 N.Y.S. 2d 630, aff'd 296 N.Y. 979 (1946); and Mallary v. City of New Rochelle, 184 Misc. 66, 53 N.Y.S. 2d 643, aff'd App. Div. 878, 51 N.Y.S. 2d 91, appeal denied 268 App. Div. 914, 51 N.Y.S. 2d 758, appeal denied 294 N.Y. 839, aff'd 295 N.Y. 712 (1944).

This argument also applies to plaintiffs' case despite the fact that some plaintiffs were members of Article I of the Fire Department Pension Fund and covered under Section B19-4.0, while others were Article IB members of such Pension Fund and within the purview of Section B19-7.83 of the Administrative Code. The latter Section neither refers to light duty nor does it prohibit such limited service. Under these circumstances, both Section

B19-4.0 and subdivision a, paragraph 4 thereunder and Section B19-7.83 must be read together to achieve fairness and stability in effectuating a policy of light duty. People v. Ryan, 274 N.Y. 149 (1937). A contrary position would, again, deprive those similarly situated of the equal protection of the laws.

Thus, the only qualification to light duty assignment follows when the employee is found by the Medical Board to be unfit for any duty; here, no such finding was ever made. Where the employee is thus medically certified as fit to perform light duty, the assignment and ultimate performance of such duty contractually vests in him a right guaranteed by the State Constitution and by statute. This right may neither be diminished nor impaired while the employee performs light duty until the mandatory retirement age of 65 years under Section 487a-19.0 of the Administrative Code.

Assuming, arguendo, that plaintiffs had not performed light duty although they were medically certified as fit for such assignment, the Medical Board's certification on its face, amply justifies the conclusion that the Fire Commissioner was bound by the recommendation and had no choice but to assign plaintiffs to light duty.

People ex rel. Cunningham v. Hayes, 66 Misc. 531, 532-533 (1910) is on all fours on this precise issue. There, peticioner, a foreman (present title of Lieutenant)

in the Fire Department, was certified by the medical officers as suffering from a non-service disability as to render him physically disabled from the performance of the duties of his position (emphasis supplied). The Fire Commissioner thereupon retired petitioner at half-pay. While the Court found that the law (Charter, section 790) conferred on the Commissioner's discretionary power to dismiss and retire any member, upon an examination by the medical officers, who may be found to be disqualified for the performance of his duties, he had no discretion to act in this case. The medical certification there failed to comply with the provisions of section 790 because it stated that "petitioner was disabled from the performance of the duties of his position, i.e., foreman, and that he was rendered unfit for the performance of fire duty. In order to comply with the statute, the certificate should state that he is unfit for the performance of duty, i.e., any duty, and not simply for the performance of fire duty or the duty of foreman; for it appears that there are other lighter duties for which he may be fitted, even if the certificate be literally true. The certificate of the medical officers is, therefore, not sufficient to sustain the commissioner's action under the clause above quoted." (emphasis added)

Cunningham fully supports plaintiffs' contention that the Fire Commissioner acted improperly when he forced

[illegible]ar retirements while ignoring the Medical Board's [illegible]tification that each plaintiff was fit to perform (and [illegible]tinue) lighter duty other than full active fire duty.

This distinction of "unfit for duty" and "unfit [illegible] full active fire duty" is clearly recognized in the statute involved here, namely, Section B19-4.0, subdivision [illegible], paragraphs 2, 4, 6 of the Code. Moreover, the Medical Board in the instant case recognized this distinction for the certificate of each plaintiff stated that he was unfit for full fire duty but fit for the performance of light duty. Simply put, had the plaintiffs been certified as unfit for duty only, that medical finding would have meant just what it says: unfit for duty of any type or nature whatsoever within the department, including light duty.

The general rule of statutory construction is that it is always presumed, with reference to a statute, that no unjust or unreasonable result was intended by the Legislature and the statute, unless the language forbids, must be given an interpretation and application consonant with the presumption. Matter of Breen v. N.Y. Fire Dept. Pension Fund, supra, at p. 19.

In People v. Ryan, supra, at p. 152, the Court of Appeals earlier said:

> "In the interpretation of statutes the spirit and purpose of the act and the objects to be accomplished must be considered. The legislative intent is the great and controlling principle.

> Literal meanings of words are not to be adhered to or suffered 'to defeat the general purpose and manifest policy intended to be promoted': all parts of the act must be read and construed together for the purpose of determining the legislative intent, and if the statute is ambiguous and two constructions can be given, the one must be adopted which will not cause objectionable results or cause inconvenience, hardship, injustice or mischief or lead to absurdity.'' (Citations omitted) (Emphasis added)

Whether plaintiffs were (1) certified medically as fit to perform light duty but had not yet been assigned to such limited service, or (2) whether they had, as in the instant case, except plaintiff Reilly, been certified to perform light duty on the LS Squad and were performing same, the legislative intent of Section B19-4.0, subdivision a, paragraph 4 read in conjunction with Section B19-7.83 of the Administrative Code is crystal clear. In both instances, and under both Sections of the Code, plaintiffs would be entitled to perform light duty as a matter of vested right and to remain in that status until each reached his mandatory retirement age.

Under all of the circumstances here, the defendant Fire Commissioner thus acted illegally when, in contravention of the pertinent constitutional and statutory provisions, Article 5, Section 7 and Section B19-4.0, subdivision a, paragraph 4 and Section B19-7.83, respectively, he breached, diminished and impaired this vested right by forcing plaintiffs' retirements prior to the statutory retirement age.

(b)

We now turn to the denied allegations of the complaint, in paragraph ''Tenth'', which alleges that the plaintiffs were ''induced or lulled by the Fire Department into a sense of security to accept in compromise, its recommendations and assignments of 'light duty' and to be relieved from active service at fires until each of them reached mandatory retirement age''; in paragraph ''Eleventh'', also denied by defendants, which asserts that the Fire Department suggested to the Medical board that if the latter would make findings of non-service connected disabilities, the Fire Department, upon recommendation of the Medical Board of fitness for light duty, would proffer to plaintiffs such duties until mandatory retirement age of 65 years; and by paragraph ''Twelfth,'' which by defendants' amended answer allowed by the Court, denied the allegations thereof but which were never disproved by defendants during the trial that plaintiffs ''accepted'' and relied upon the promises and/or inducements as aforesaid and thereby began their performance of light duty ***; accordingly, in reliance of the factors outlined in paragraphs of the complaint numbered ''Tenth'' ''Eleventh'' and ''Twlefth'', the plaintiffs waived their rights to apply for service-connected disability retirement. (emphasis added)

We call attention to the fact that it is most significant that not one Commissioner, including the present one, was called by the defense to deny the forthright and clear testimony backed by documentary proof. The only conclusion to the drawn therefrom is that plaintiffs' testimony was true.

POINT III

THE THEORY OF ESTOPPEL APPLIES IN THIS CASE

Before a person is estopped to deny the truth of his representations, it should either be shown that he actually meant to have such representations relied upon, or that they were made in circumstances from which such intention on his part might be reasonably inferred. Muller v. Ponder, 55 N.Y. 325. It follows that there need not have been an actual design to mislead. It is enough that the act of misrepresentation was calculated to mislead and did mislead the other party to his disadvantage while acting in good faith and with reasonable care and diligence. Halloney v. Horan, 49 N.Y. 111.

Even assuming, arguendo, that there was here some question of fact, defendants are, nevertheless, estopped from denying the promises made as attested by the plaintiffs and not rebutted by the defendants because plaintiffs accepted light duty on that basis. Only reasonably justified reliance will create an estoppel and

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reliance is not justified, as in this case, where knowledge to the contrary obtains.

Furthermore, one may not even innocently mislead another and then claim the benefit of the deception. Triple Cities Const. Co. v. Maryland Gas Co., 4 N.Y. 2d 443 (1958)

POINT IV

SIGNIFICANT TESTIMONY AND DOCUMENTARY PROOF AT THE TRIAL FAVORING THE PLAINTIFFS

It is abundantly clear that plaintiffs Montagna and Malone were members of Article I of the Pension Fund and therefore within the purview of Administrative Code Section B19-4.0, more particularly subparagraph "4" thereof. The proof adduced at the trial showed that when a member of Article I is relieved of his fire duties, he "**** shall remain a member of the uniformed force, subject to the rules governing such force and be assigned to the performance of such light duties as a medical officer of such department may certify him to be qualified to perform***." (emphasis supplied)

When questioned with respect to "quotas" maintained by the Fire Department and the authority to retire these plaintiffs and replace them on budget lines with other members on the list for LSS appointments, the witness Muller, as Chief in Charge of the Bureau of Personnel and

Administration reluctantly conceded that the "description of quotas and the meaning of them is limited entirely to budget certificate authority" (p. A62) [emphasis supplied]. He made a similar concession when asked whether there was anything in Plaintiffs' Exhibit 2 (Regulations for the Uniformed Force, Fire Department) which permitted or established the right to a quota system as affecting either LS members or regular members. His specific answer was - "No there is nothing in the regulations (p. A66)."

Upon examining Plaintiffs' Exhibit 3 (p. A 247) relating to "Administrative Separations from the New York Fire Department Limited Service Personnel," it is quite obvious by its first paragraph that the general purpose stated therein was to maintain the limited service members within a quota agreed to by the Fire Department and the office of the Budget Director as expressed in Budget Certifications. This does not mean, in any sense, that separations here were made according to law, just as in the Breen and Cunningham cases, supra. Certainly, too, it does not mean that a member is properly separated from service when he is certified by the Medical Board as fit to continue his light duties on the LS Squad or when he has been denied positive certification by the Medical Board as in the case of each plaintiff except Reilly, in either Article I and IB. We urge this result, too, in the IB membership cases since IB incumbents had already been assigned to and did perform

light duty. It might have led to different results if none had been assigned to the MS Squad.

The foregoing questions were asked simply to demonstrate that the words in the pertinent statute "subject to the rules governing such force" when replacement of those in limited service occurred, were not, in fact, contrary to Section B19-4.0 and therefore repugnant to due process under the Constitution.

On cross-examination, Muller testified that the Fire Commissioner, within his discretion, may retire any member. And, when he so desires, he orders such member to be physically examined by the Medical Board to determine his condition. We do not argue with the premise that it is the Medical Board which legally is vested with the power to determine the physical ability to perform full fire duties. What we do urge is that it is also the power of the Medical Board, and not the Fire Commissioner, to certify the kind of light duty to be assigned in all disability cases where full fire duty is impossible of performance due to either service or non-service connected injuries. It is only then that the Medical Board recommends to the Fire Commissioner that the member be placed on light duty and this is what is meant by the words "subject to the rules governing such force. The recommendation so made by the Medical board is, in all instances, binding upon the Fire Commissioner. In this case, the light duty extended to plaintiff

was actually fully executed, and from time to time, continued after satisfactory performance by each of them. Once made, these assignments no longer were subject to the whim of the Commissioner but were binding upon the department unless by positive certification of the Medical Board, it was thereafter determined that the member was unable to carry out those light duties or else had reached his mandatory retirement age of 65 years.

In the cases of Montagna and Malone, the Board's last actions in connection with their retirements were the certifications recommending continuance of LSS. In the cases of all others, except Reilly, there was the failure of the Medical Board to declare them incapable of performance of light duty. So far as Reilly was concerned, it is certain, from the proof in this case, that he was tricked into a retirement by dangling his promotion to Battalion Chief on condition only that he would submit his early retirement papers. Certainly, there was no consideration for exacting this promise since Reilly had passed the Civil Service test for promotion to Battalion Chief which actually was being withheld for reasons best known to the Fire Department.

Defendants, over objection, introduced into evidence Exhibit A (p. A-269-A-273) which was a transcript of a stipulation dated June 27, 1958 in the case of McKeon v. Cavanaugh. This allegedly concerned itself with a

question of out-of-title work and claimed by defendants to apply to quotas. This document not only was erroneously received but failed to tie-in the plaintiffs within the document's scope and clearly was irrelevant to the issues of this case.

The defendants produced Lieutenant Doherty as a witness. He testified on direct examination that he was the Board of Trustees' Operational Secretary and had served the Fire Department for 23 years. He described the difference between membership under Article I and IB, saying that membership in the former category was, prior to March 29, 1940, and in the latter instance, subsequent thereto. He stated that it is the Chief in charge of the Bureau of Personnel and Administration (true in Chief Muller's case as it was in Hartnett's and Massett's cases), who had the authority pursuant to the Fire Commissioner's designation to make assignments to the LS Squad (p. A-190) after the Medical Board made the required determination of physical inability to perform full fire duties (p. A-190). He also admitted, on cross-examination, that plaintiffs Montagna and Malone had their last physical examinations on November 25, 1968 when the Medical Board recommended their continuance in the LS Squad but that despite that recommendation, both were, nevertheless, contrarily retired on Oct. 2, 1969.

He readily admitted that it is the Fire Commissioner who issues an order when he desires action (p. A-194) and that it is the Chief in Charge of Personnel and Administration who carries out that order (p. A-195).

The Court's attention is respectfully directed to Doherty's testimony on the meaning of the words "may engage in a suitable sedentary occupation". His answer (p. A202) said "Actually, that has nothing to do with the Limited Service Squad. That has to do with the possibilities of his employment after retirement. That is for the information of the Board of Trustees." (emphasis supplied). This answer is utterly ludicrous for who would believe that the Board of Trustees or for that matter anyone in the Fire Department would be concerned with a former member's work performance in private employment after his services had been terminated by retirement.

CONCLUSION

The intermediate orders and the judgment entered in the above action dismissing the complaint should be reversed and, instead, judgment should be rendered in favor of the plaintiffs for the relief demanded in the complaint.

Respectfully submitted,

Of Counsel
Howard C. Fischbach
Tel. 465-4096

ISRAEL & LEEDS
Office & P.O. Address
170 Broadway
New York, N.Y.
Tel. 964-0914

EXHIBIT E - ORDER OF AFFIRMANCE BY APPELLATE DIVISION

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 17th day of January, 1974.

Present- Hon. Owen McGivern, Presiding Justice
Francis T. Murphy
Aron Steuer
Louis J. Capozzoli, Justices.

- - - - - - - - -

SAME TITLE

- - - - - - - -

ORDER OF AFFIRMANCE ON APPEAL FROM ORDER AND JUDGMENT

An appeal having been taken to this Court by the plaintiffs-appellants from an order of the Supreme Court, New York County, (Riccobono, J.), entered on the 23rd day of June, 1972, denying plaintiffs' motion for summary judgment, and from the judgment entered in the office of the Clerk of the County of New York (Fein, J.), on the 16th day of April, 1973, dismissing the complaint, and said appeal having been argued by Mr. Howard C. Fischbach of counsel for the appellants, and by Nina G. Goldstein of counsel for the respondents; and due deliberation having been had thereon,

Exhibit E - Order of Affirmance by Appellate Division

It is hereby unanimously ordered and adjudged that the order and judgment so appealed from be and the same are hereby in all things, affirmed; without costs and without disbursements.

Enter: HYMAN W. GAMSO
Clerk.

MEMORANDUM AND ORDER OF PLATT, J.
(Filed October 23, 1975) (pp. JA128-JA137)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- -x

CONSTANTINE MONTAGNA,

Plaintiff,

-against-

JOHN T. O'HAGAN, as FIRE COMMISSIONER OF THE CITY OF NEW YORK and as CHAIRMAN and TREASURER OF THE FIRE DEPARTMENT PENSION FUND (ARTICLE I) and the BOARD OF TRUSTEES OF THE FIRE DEPARTMENT PENSION FUND,

Defendants.

- -x

75 Civ. 602
MEMORANDUM AND ORDER

October 22, 1975

PLATT, D.J.

Both parties have moved for summary judgment pursuant to FRCP 56; the plaintiff on the ground that there is no genuine issue of any material fact and that he is entitled to judgment as a matter of law, and the defendants on the ground that plaintiff's complaint is barred by the Statute of Limitations and by res judicata and/or collateral estoppel.

Jurisdiction is allegedly obtained under Title 28 United States Code § 1343, and plaintiff alleges in his complaint that his "claim is predicated upon provisions of Title 42 United States Code § 1983, in that he was wrongfully retired from his employment as Lieutenant in the Uniformed Fire Forces of the Fire Department of the City of New York in violation of his rights as a citizen of the United States under the Constitution of the United States, specifically,

but not limited to, his rights to equal protection of the laws pursuant to the Fourteenth Amendment thereto and the Constitution of the State of New York, Article I, Section 11."

After alleging that the matter in controversy exceeds, exclusive of the interest and costs, the sum of $10,000, the complaint seeks a judgment declaring void plaintiff's alleged wrongful retirement, mandating his reassignment to light duty until he reaches the retirement age of 65 years and granting him appropriate salary and wage differential adjustments.

Plaintiff became a fireman and a member of Article I of the Fire Department Pension Fund on January 1, 1938, and over the years after passing civil service promotion examinations he attained the rank of Lieutenant and aggregated a total service of 31 years.

In 1962 the Medical Board of the Fire Department found plaintiff to be suffering from a partial permanent disability not caused in the performance of his duties and recommended that he be assigned to the Light Service Squad pursuant to Section B19-4.0, subdivision A, paragraph 4 of the Administrative Code of the City of New York.

Periodically thereafter plaintiff's condition was re-evaluated by the Board and after his last examination in November of 1968 the Board rendered its opinion that his condition was unchanged and that he should be continued in limited service.

Thereafter, on the application of the Fire Commissioner, plaintiff was retired on ordinary disability on October 2, 1969.

On or about November 16, 1970, the plaintiff, together with certain other firemen, commenced an action in the Supreme Court, New York County, entitled Sarrosick v. Lowery, et al. (not officially reported, index number 6376/1971, aff'd without opinion 43 App. Div. 2d 911, leave to appeal denied 34 N.Y.2d 514 (1974)). In that action plaintiffs sought (i) to enforce certain claimed constitutional rights and contract rights under the pertinent Administrative Code provisions allegedly applicable to their membership, (ii) to obtain a declaration that their retirement was null and void, (iii) to obtain reassignment to light duty until they reached the retirement age of 65 and (iv) to receive appropriate adjustments in their wages and salaries.

In an unreported memorandum decision dated March 30, 1973, rendered after trial, Mr. Justice Arnold Fein granted defendants judgment dismissing the complaint. Plaintiff appealed to the Appellate Division, First Department, and, after an affirmance without opinion, sought leave to appeal from the Court of Appeals which application was denied. (34 N.Y.2d 514 (1974)).

On or about April 22, 1975, plaintiff filed his summons and complaint in this action.

At the outset it may be observed that neither party raised, briefed or argued the question of whether this action may be maintained against the defendants since they are all sued in their official rather than individual capacities. See: Monroe v. Pape, 365 U.S. 167 (1961); City of Kenosha v. Bruno, 412 U.S. 507 (1973), Accord: Moor v. County of Alameda, 411 U.S. 693 (1973) but cf. cases involving injunction against public officials from invading constitutional rights. Ex Parte Young, 209 U.S. 123 (1908); Griffin v. County School Board of Prince Edward County, 377 U.S. 218 (1964).

In view of this Court's disposition of this case on other grounds, however, it is not necessary to resolve this question.

Defendants' first ground for their motion for summary judgment is that plaintiff's action is barred by the applicable Statute of Limitations.

Where there is no applicable Federal Statute of Limitations, the Federal courts have repeatedly held in civil rights and other cases that the limitations law of the forum state must be applied. Campbell v. City of Haverhill, 155 U.S. 610 (1895); UAW v. Hoosier Corp., 383 U.S. 696 (1966).

In this Circuit the courts have further repeatedly held that the Statute of Limitations for a civil rights action is the one for actions "to recover upon a liability created by statute." Viz: CPLR § 214(2); Swan v. Board of Higher Education of the City of New York, 319 F.2d 56 (2d Cir. 1963);

Romer v. Leary, 425 F.2d 186 (2d Cir. 1970); Kaiser v. Cahn, 510 F.2d 282 (2d Cir. 1974); Bomar v. Keyes, 162 F.2d 136 (2d Cir. 1947), cert. denied, 332 U.S. 825 (1947); Laverne v. Corning, 316 F.Supp. 629 (S.D.N.Y. 1970), modified on other grounds, 376 F.Supp. 836 (S.D.N.Y. 1974), aff'd as modified _____ F.2d _____ (2d Cir. 1975); Beyer v. Werner, 299 F.Supp. 967 (E.D.N.Y. 1969).

Section 214(2) of the New York Civil Practice Law & Rules prescribe a three-year limitation period for actions to recover upon a liability created by statute.

Since plaintiff's claim for wrongful retirement accrued in October of 1969, it is clear that any claim for deprivation of civil rights in connection therewith became time-barred in October of 1972 and hence his action instituted in April of 1975 is clearly barred.

Plaintiff seeks to circumvent the impact of this statute and the above cited cases by characterizing his claim as one for impairment of a contractual obligation or liability. In seeking to avoid the impact of defendants' second ground for summary judgment on the basis of res judicata and/or collateral estoppel, however, defendants contend that "the only constitutional remedy invoked in the earlier Sarrosick case" under the New York State Constitution was that "membership in any pension or retirement system of the State or of a civil division thereof shall be a contractual relationship the benefits of which shall not be diminished or repaired."

FPI—SS—3-17-72—20M—9153

In other words, not only is any such claim or issue properly determinable in the State court rather than in this Court but by plaintiff's own admission it was so determined in the prior State court proceeding herein.

Accordingly, plaintiff's contention in this respect appears to be wholly without merit. If, as it appears, plaintiff's action is grounded on 42 U.S.C. § 1983, then it is barred by the three-year statute of limitations. If, as plaintiff here contends, his action is grounded in an alleged contract, then his argument has already been rejected in State court and is barred under the doctrine of res judicata, or collateral estoppel. Under either circumstance, the Court must dismiss.

It also appears that a claim under § 1983 is barred by res judicata or collateral estoppel as well as by the statute of limitations. The essence of plaintiff's claim in this action is that he was denied his constitutional (both State and Federal) rights to the equal protection of the laws when the Commissioner made a distinction between the class of employees which had sustained service related disabilities and the class which had incurred non-service connected disabilities, retaining the former in light duty service and retiring the latter.

In his brief on appeal to the Appellate Division, First Department, in the Sarrosick case, plaintiff argued, inter alia (at pp. 19, 22, 23 and 24):

> "We ask this Court to hold that, in law, no real basis warranting distinction between the provisions of B19-4.0 really is justified where all members of the Pension Funds, who received light duty, are and should be entitled to the same ultimate disposition on the theory of equal protection of the laws.
>
> * * *
>
> Whether an employee has sustained a service or non-service connected injury, he has, as a member of his pertinent retirement system, specific constitutional rights extending to situations where a certification of light duty has been granted and performed. Protecting only those who sustained a service related disability and deprive others falling into a non-service category, whenever the question of light duty arises, would be contrary to the constitutional rights guaranteed employees suffering from either type of disability. To do otherwise would establish classifications favoring one over the other, thus denying the employee with a non-service connected injury of the equal protection of the laws under Article 1, Section 11 of the State Constitution. The essence of this constitutional right to 'equal protection of the laws' is that all persons similarly situated, e.g. those actually assigned rather than the right to be assigned to perform light duty work, must be treated alike. Myer v. Myer, 271 App. Div. 465, 66 N.Y.S. 2d 83, motion denied 271 App. Div. 823, 66 N.Y.S. 2d 618, appeal granted 271 App. Div. 869, 66 N.Y.S. 2d 630, aff'd 296 N.Y. 979 (1946); and Mallary v. City of New Rochelle, 184 Misc. 66, 53 N.Y.S. 2d 643, aff'd App. Div. 878, 51 N.Y.S.2d 91, appeal denied 268 App. Div. 914, 51 N.Y.S.2d 758, appeal denied 294 N.Y. 839, aff'd 295 N.Y. 712 (1944). B19-4.0 abd subdivision a, paragraph 4 thereunder and Section B19-7.83 must be read together to achieve fairness and stability in effectuating a policy of light duty. People v. Ryan, 274 N.Y. 149 (1937). A contrary position would, again, deprive those similarly situated of the equal protection of the laws."

FPI—S3—3-17-72—2011—0153

In other words, plaintiff made essentially the same equal protection arguments in the prior State court action as he advances here.

The law is that once an issue has been litigated in the State courts, it may not be relitigated in the Federal courts. Taylor v. New York City Transit Authority, 433 F.2d 665 (2d Cir. 1970).

Neither Lombard v. Board of Education, 502 F.2d 631 (2d Cir. 1974), cert. denied, 420 U.S. 976 (1975), nor Newman v. Board of Education, 508 F.2d 277 (2d Cir.), cert. denied, 420 U.S. 1004 (1975), have changed this rule. Indeed, Judge Gurfein in the Lombard case specifically stated that (502 F.2d at pp. 636-637):

> "Of course, where a constitutional issue is actually raised in the state court, as it can be in an Article 78 proceeding by treating it as an action for a declaratory judgment, Matter of Kovarsky v. Housing & Development Administration, 31 N.Y.2d 184. 335 N.Y.S.2d 383, 286 N.E. 2d 882 (1972), the litigant has made his choice and may not have two bites at the cherry. See Thistlethwaite v. City of New York, 497 F.2d 339 (2d Cir. 1974)."

In the Newman case the Court of Appeals merely held that for a preclusion to be effective "elaborations or citations of authority" must be presented in the State court proceeding and not just a mere mention of the constitutional question. As indicated above, the plaintiff elaborated the equal protection argument to the Appellate Division and presented it with numerous citations of authority.

FPI—SS—3-17-72—30M—9153

In Brown v. DeLayo, 498 F.2d 1173 (1974), a discharged teacher lost an appeal from a State court determination that she had been denied her due process rights under the United States Constitution and thereafter commenced an action in the Federal District Court claiming violations of her constitutional rights under 28 U.S.C. § 1343(3) and (4), and 42 U.S.C. §§ 1981 and 1983. In holding that since her due process claims had been litigated in the State courts, the teacher was "collaterally estopped" from raising them again in Federal Courts, the Tenth Circuit Court of Appeals said (498 F.2d at pp. 1175-1176):

> "The issue is not res judicata because that principle 'applies to repetitious suits involving the same cause of action.' Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591, 597, 68 S.Ct. 715, 719, 92 L.Ed. 898. The §§ 1981 and 1983 claims presented here were not before the state courts. However, the state claims and the present civil rights claims all depend on the determination of the question of whether the teacher was denied due process. In this situation the judgment in the prior actions 'operates as an estoppel * * * "as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered."' Ibid. at 598. The principle of collateral estoppel by judgment precludes the relitigation of matters litigated and determined in a prior proceeding. Ibid.
>
> "* * * A prior state court adjudication of a federal constitutional right bars a subsequent federal action seeking vindication of the same right. Hanley v. Four Corners Vacation Properties, Inc., 10 Cir., 480 F.2d 536, 538. The rule applies even though the federal action is brought under §§ 1981 and 1983. The Civil Rights Act is not a vehicle for a collateral attack on a final state court judgment. Bricker v. Crane, 1 Cir., 468 F.2d 1228, 1231, cert. denied 410 U.S. 930, 93 S.Ct. 1368, 35 L.Ed.2d 592. See also Parker v. McKeithen, 5 Cir., 488 F.2d 553, 557-558; Tang v. Appellate Division of New York Supreme Court First Department, 2 Cir., 487 F.2d 138, 141-143,

cert. denied 416 U.S. 906, 94 S.Ct. 1611, 40 L.Ed.2d 111 and Coogan v. Cincinnati Bar Association, Cir., 431 F.2d 1209, 1211.

"The teacher seeks to avoid estoppel by claiming different issues and parties in the state and federal actions. As to issues she points to her claims of back pay, retirement benefits, and conflict of interest of a state official. These are all ancillary to and dependent upon determination of the fundamental due process claim. She voluntarily litigated that claim in the New Mexico courts and had a full and fair opportunity to present her contentions, with an adverse result. Determination of her right to lost income between the date of discharge and the date of the hearing on the propriety of discharge cannot be determined on the appeal before us."

For the foregoing reasons it is clear that plaintiff's complaint herein is both time and otherwise barred and must be dismissed.

SO ORDERED.

Thomas C. Platt

U.S.D.J.

JUDGMENT DISMISSING COMPLAINT (Filed October 24, 1975)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.
★ OCT 24 1975 ★
TIME A.M.
P.M.

COSTANTINE MONTAGNA,

Petitioner,

- against -

JOHN T. O'HAGAN, as FIRE COMMISSIONER OF THE CITY OF NEW YORK and as CHAIRMAN and TREASURER OF THE FIRE DEPARTMENT PENSION FUND (ARTICLE I) and the BOARD OF TRUSTEES OF THE FIRE DEPARTMENT PENSION FUND,

Defendants.

JUDGMENT

75 Civ. 602

A memorandum and order of the Honorable Thomas C. Platt, United States District Judge, having been filed on October 23, 1975, denying the plaintiff's motion for summary judgment and granting the defendants' motion for summary judgment that the complaint be dismissed as being both time and otherwise barred, it is

ORDERED and ADJUDGED that the plaintiff take nothing of the defendants and that the complaint is dismissed.

Dated: Brooklyn, NewYork
October 24, 1975

Lewis Orgel
Clerk

A 202 Affidavit of Personal Service of Papers LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CONSTANTINE MONTAGNA,
Plaintiff- Appellant,

- against -

JOHN T. O'HAGAN et. al.,
Defendant- Appellees,

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF **NEW YORK** *ss.:*

I, Victor Ortega, *being duly sworn,*
depose and say that deponent is not a party to the action, is over 18 years of age and resides at
1027 Avenue St. John, Bronx, New York

That on the **9th** *day of* **Febrary** *19* **76** *at* **Municipal Building, New York, New York 10000**

deponent served the annexed Appendix *upon*

W. BERNARD RICHLAND

the **Attorney** *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* *herein,*

Sworn to before me, this **9th**
day of **Febrary** *19* **76**

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

Victor Ortega

VICTOR ORTEGA